THE CONVEYANCER
AND
PROPERTY LAWYER

Vol. 19, No. 5 SEPTEMBER—OCTOBER, 1955

CONVEYANCER'S NOTEBOOK

Extension of Compulsory Registration to Kent

Orders in Council, the Registration of Title (Kent) Order, 1955, and the Registration of Title (Canterbury) Order, 1955, (S.I. 1955, Nos. 956 and 957), under section 120 of the Land Registration Act, 1925, have been made at the instance of the Kent County Council and the Canterbury City Council declaring that registration of title to land is to be compulsory on sales in Kent. The Orders come into effect with respect to different areas on varying dates. The dates are as follows:—

Area	Date when registration becomes compulsory.
The municipal boroughs of Chatham, Gillingham, Gravesend and Rochester; the urban districts of Swanscombe and Northfleet; and the rural district of Strood.	March 1, 1957.
The municipal boroughs of Deal, Dover, Margate, Ramsgate and Sandwich; the urban district of Broadstairs and St. Peters; and the rural districts of Bridge-Blean, Dover and Eastry.	January 1, 1958.
The city of Canterbury.	January 1, 1958.
The municipal boroughs of Faversham, Folkestone, Hythe, Lydd, Maidstone, New Romney, Queenborough and Tenterden; the urban districts of Ashford, Herne Bay, Sheerness, Sittingbourne and Milton, and Whitstable; and the rural districts of Cranbrook, East Ashford,	

Elham, Hollingbourn, Maidstone, Malling, Romney Marsh, Sheppey, Swale, Tenterden and West Ashford.	October 1, 1958.
The municipal boroughs of Beckenham, Bexley, Bromley, Dartford, Erith and Royal Tunbridge Wells; the urban districts of Chislehurst and Sidcup, Crayford, Orpington, Penge, Sevenoaks, Southborough and Tonbridge; and the rural districts of Dartford, Sevenoaks and Tonbridge.	January 1, 1961.

The effect of the Orders is that after the dates in question conveyances on sale of freehold land, leases for not less than forty years, and assignments of leasehold land not having less than forty years to run, must be registered within two months from the date of the particular instrument.

Report on H.M. Land Registry for 1954–55

During the past year practitioners have noticed that the delay at the Land Registry has become increasingly serious, and, indeed, the position is worse than at any time since 1948. In his annual report (H.M. Stationery Office, price 1s. 6d.) the Chief Land Registrar points out that the delay is in most cases more embarrassing to the Registry than to the parties, and, having been over the Registry, we are satisfied that this is so. It is annoying to wait some weeks to know whether everything is in order, but in general there is no real inconvenience to the parties. To the Registry, however, it means an accumulation of files at different stages of registration and a lot of wasted effort in tracing a particular file if this should be necessary for a search certificate.

Arising out of this delay the Chief Land Registrar says: "Should the volume of work continue to increase it will become necessary to consider if it is proper or desirable that the efficient operation of the Registry should continue to be hampered by voluntary registrations." For many years the Registry have been arguing their case, and their argument has met with a good deal of success. During the year under review there were nearly 3,000 first registrations in non-compulsory areas, an increase of 12 per cent. over the previous year, and at the end of the report it is said: "It is the continued success of the policy of making available by all possible means houses for owner-occupation which has been mainly responsible for the higher volume of work presented to the Department. . . ." It would be a serious blow if voluntary registration in non-compulsory

areas were to be banned, for where an area is being developed for housing purposes there is a substantial saving in cost if the land is registered first, and this saving may make the difference whether a person can buy his house or not. We hope, therefore, that we shall hear no more of this suggestion of prohibiting voluntary registration.

Apart from the steady increase in work done by the Registry, there has been little to report during the past year. The report notes that a number of flats and maisonettes have been registered and that the more complex type of transaction continues to predominate over the simple and straightforward one. The cost of the Registry's services per transaction has increased to 24s., which is an increase of 1d. The 1938 figure was 17s. 3d. so that we do not think there can be any complaint on this score.

SOME DEVELOPMENTS IN THE LAW RELATING TO INJURIOUS AFFECTION

By W. B. Stern, m.a., Solicitor

I

The increase, in our time, in the social services performed by the community has resulted in a wide extension of public ownership in land. Land is required by public bodies, whether Government Departments, public corporations or local authorities, both for administrative and "operational" purposes, such as housing or the provision of schools. If the public body have compulsory powers, they can take the land against the will of the owner, and at a price which may be below the market value of the land.

But the owner whose land is taken is not the only person concerned. The transfer of the land into public ownership may affect the owners of neighbouring land as well. Whenever a public body are authorised by statute to execute works on land or to use land for a particular purpose, such statutory authority is a defence against actions for what, without such authority, would be a tort. A neighbouring owner whose land is diminished in value or in usefulness by the erection of a hospital for infectious diseases or the breach of a restrictive covenant, cannot, if the acts in question have been done by a public body under statutory powers, claim an injunction against the public body or sue for damages. He may be entitled to compensation; but compensation is a statutory remedy, and, unless the statute provides for it, the power given to the public body to disregard the rights of neighbouring owners amounts to confiscation.

Such, in the most general terms, is the law relating to "injurious affection." It is true that it is not, in theory, confined to public bodies, but applies also when a private person is authorised by statute to interfere with the rights of neighbouring landowners. But the preponderance, in this field, of public bodies is so overwhelming that they are today the prototype of what the Lands Clauses Acts term "the promoters," and only public bodies will be considered in this paper.

This preponderance of public bodies is of modern date. When the Lands Clauses Act, 1845, came into force, this country was in the process of equipping itself for the industrial age, and it was

private enterprise which provided railways, canals, waterworks, harbours, etc. The legal framework for these activities consisted usually in a private Act of Parliament incorporating the promoters of the undertaking and defining, by reference to deposited plans, books of reference and sections, the land which they were authorised to take and the works which they were empowered to execute. This way of conferring powers had two important effects: the lands to be taken and the works to be executed were known from the start, and the private Bill procedure enabled persons who might be affected by the scheme to oppose it before it became law.

But hand in hand with the industrialisation of the country went the increase in its population and the agglomeration of the people in towns, and this development brought with it the need for new or better social services. The majority of these services could not be provided on a business basis and were entrusted to public bodies. Moreover, services such as the provision of hospitals or schools were dependent on social developments: statutes could do no more than confer upon the public body a general power to provide the service, leaving the actual location on particular sites to administrative action.

Thus, in the case of a statute authorising the provision of a public service, landowners who would ultimately be affected had no opportunity of raising objections before the passing of the Act: there was no private Bill procedure, nor would such procedure have been of any avail to them, since the Bill did not specify the land affected, but left the selection of the sites to future administrative action. On the other hand, it would be incompatible with the principles on which the social and political order of this country is based if administrative action could take land from its owners without their having an opportunity of previously stating their objections. For the purpose of giving them such an opportunity the various compulsory purchase procedures were introduced. Their effect is to enable both the owner of the land which a public body propose to take and third persons who may be affected by the scheme to raise their objections before the scheme becomes definitive. But these safeguards will not work where the public body acquire land by agreement. In such a case the owner of the land to be taken needs, of course, no protection since by selling his property he shows that he has no objection against parting with his land. But what is the position of neighbouring landowners who may be injuriously affected? Can they restrain the public body from interfering with their

rights? Or is the statute authorising in general terms the acquisition of land for a social service a good defence to the public body against the claims of owners of land other than that purchased by them?

In the absence of any express provision the question is not easy to answer, and it was answered in two well-known cases in opposite senses. In *Metropolitan Asylum District* v. *Hill* (*a*) it was held that a statute authorising a public body to purchase land by agreement for the provision of hospitals for infectious diseases did not justify the creation thereby of a nuisance to the owners of adjoining land. On the other hand, when the Education Act, 1870, empowered school boards to provide schools it was held in *Kirby* v. *Harrogate School Board* (*b*), that third persons whose rights were interfered with by the erection of a school on land purchased by a school board by private treaty were not entitled to an injunction or to damages.

There is a tendency today to regard *Hill's* case as obsolete: a remnant of the age of *laisser-faire* giving an undue preference to the claims of individuals as against those of society. There are, however, differences between the two cases which are sufficient to explain the different conclusions arrived at. The question whether a statute authorising the acquisition of land for a particular purpose authorises also the interference with third party rights is one of construction of the statute. The erection of a hospital for infectious diseases may change the whole character of the surroundings and will seriously affect both the amenities and the market value of neighbouring properties, and moreover, the statute relied on in *Hill's* case did not even provide for compensation. The injury arising from the erection of a school will be on a much smaller scale—in *Kirby's* case it was nothing more than the projection of two bays or turrets beyond a distance of 30 feet of the boundary in violation of certain restrictive covenants, and in addition the Education Act, 1870, provided for compensation. In these circumstances it is not surprising that the courts arrived at different conclusions in *Hill's* and in *Kirby's* case.

The two cases just mentioned show the importance of compensation in deciding whether a public body acquiring land may override third party rights. To make such rights unenforceable without compensation amounts to confiscation, and an intention to confiscate is not to be presumed without a clear indication (*c*).

(*a*) (1881) 6 App.Cas. 193.
(*b*) [1896] 1 Ch. 437.
(*c*) But cases such as *Hammersmith Ry.* v. *Brand* (1869) L.R. 4 H.L. 171 and *Vaughan* v. *Taff Vale Ry.* (1860) 5 H. & N. 679 show that the field in which confiscation of third party rights is allowed, is rather wide: an adjoining owner

On the other hand, once a statute provides for compensation, it is clear that the primary right of the third party is unenforceable, since otherwise there would be no subject-matter for compensation.

In order, therefore, to ascertain the position of a third person injuriously affected it will usually be necessary to examine whether the statute conferring on a public body power to acquire land for a particular purpose provides compensation for third parties injuriously affected by the putting into effect of that purpose. As a rule, the authorising statute does not itself deal with the question of compensation, but may do so indirectly by incorporating the Lands Clauses Acts and in particular that part of the 1845 Act which presupposes (though it does not create) a right to compensation, *i.e.*, the group of provisions dealing with purchase "otherwise than by agreement"; the most important clauses for our purpose are clauses 22, 63 and 68. It has been held that, when the clauses dealing with compensation have been incorporated with the authorising statute, no other enactment is needed in order to confer a right to compensation (*d*), and further that if the Lands Clauses Acts are incorporated in their entirety, the compensation clauses apply even to a purchase by agreement (*e*).

The consequence, then, of such incorporation is that when a public body purchase land by private treaty, neighbouring landowners can be deprived of their rights in respect of that land without any opportunity of previously stating their objections, and have to be satisfied with compensation. Such a position did not recommend itself to the legislator when framing those sections of the Local Government Act, 1933, dealing with the purchase of land by local authorities for statutory purposes, which purchases cover, of course, a large part of the cases with which we are dealing. Under section 176 of that Act, where a local authority acquire land by agreement, the Lands Clauses Acts apply, but amongst the clauses excepted from incorporation are those relating to purchase otherwise than by agreement and which include those dealing with compensation for injurious affection. Consequently a local authority acquiring land by agreement have to respect the rights of third parties, unless they agree to release their rights. In the case of restrictive covenants it may be difficult to obtain an effective release because the persons entitled to the benefit of the covenants will often be unknown. In such cases the only

is without any remedy for loss suffered by the authorised use of (as distinguished from the erection of works on) land acquired by a public body under statutory powers.

(*d*) *R.* v. *Vestry of St. Luke's, Chelsea* (1871) 1 Q.B. 572.

(*e*) *Kirby's* case, *ante*.

way out is the putting into motion of the compulsory purchase procedure.

To overcome these difficulties some local authorities have obtained private Acts enabling them, even on a purchase of land by private treaty, to disregard the rights of third parties and to pay compensation instead (*f*). Time and trouble is thereby saved to the authority. Whether this saving justifies the inroad into private rights authorised by such an Act is a different question. In many cases only restrictive covenants will be affected which, even if they are not obsolete, may not be of great importance to the beneficiaries. On the other hand, the local authority's scheme may deprive third parties of a right of way or may cause a nuisance (*e.g.*, a sewage works) which cannot be adequately compensated by a money payment.

It may be added that even under the Local Government Act, 1933, there is a case in which third parties can be deprived of their rights without any previous hearing. A local authority may acquire land for a purpose not involving any injury to neighbouring landowners, *e.g.*, a public library. The authority may afterwards find that they do not require, or no longer require, the land for that purpose, but they wish to use it for some other statutory purpose, *e.g.*, for public conveniences. At one time they could not have done so: section 175 of the Public Health Act, 1875, provided for the sale of land not required for the purpose for which it was acquired, and this provision was applied strictly (*g*). But by section 163 of the Local Government Act, 1933 (replacing an enactment of 1907), a local authority is now empowered to appropriate land for a purpose (approved by the Minister of Housing and Local Government) other than that for which it was acquired. Third persons who may be injuriously affected by the change of use have no statutory right to be heard before the appropriation takes effect, and so they may find that they have without any notice been deprived of some important incident of their property in exchange for some money payment.

II

During the last generation the functions of public bodies have further expanded, and one particular form of that expansion has a special interest with regard to the rights of third persons who may be injuriously affected by the exercise of these functions. The purpose for which a public body acquire land nowadays

(*f*) *e.g.*, Middlesex County Council Act, 1950, s. 24.
(*g*) *Att.-Gen.* v. *Hanwell U.D.C.* [1900] 2 Ch. 377.

frequently involves its permanent use not by the public body themselves or under their direct control, but by a private person. To give some illustrations:

(a) Under Part V of the Housing Act, 1936, and the Housing Act, 1949, a local authority has power to acquire either houses or land for the erection or improvement of houses, and they may sell or lease any land so acquired or any houses on the land or erected by them.

(b) Schools established otherwise than by a local authority (in particular by a denominational body) but maintained by the local education authority are known as voluntary schools. The duty of the local education authority to maintain such schools includes, under section 3 of the Education Act, 1946, and the First Schedule thereto, the duty to provide any additional or substituted site for a voluntary school, and para. 6 of the First Schedule prescribes that the authority are to convey their interest in the site and in any buildings on the site to the trustees of the school.

(c) In order to provide for the industrial development of certain areas the Distribution of Industry Acts, 1945 and 1950, authorise the Board of Trade to acquire land for the provision thereon of premises needed for meeting the requirements of industrial undertakings or to acquire existing industrial premises. The Acts do not prescribe the way in which the land or premises so acquired are to be made available to industry, but section 12 (2) of the 1945 Act shows that this is to be done "by sale or lease or otherwise."

(d) The New Towns Act, 1946, provides for the creation of new towns by development corporations constituted under the Act. Such corporations have power to acquire land by agreement or by means of compulsory purchase orders, and they may dispose of any land so acquired by them for securing the development of the new town (*h*).

(e) Under sections 38 and 40 of the Town and Country Planning Act, 1947, the Minister of Housing and Local Government can authorise specified local authorities to acquire compulsorily or by agreement land for securing proper development or redevelopment in their area. The acquiring authority can, instead of developing the land themselves,

(*h*) They can transfer the freehold or grant a lease for more than 99 years only with the consent of the Minister of Housing and Local Government to be given only in exceptional circumstances.

dispose of it for this purpose with the consent of the Minister. Again, under section 43 of the Act, the Central Land Board may, with the Minister's approval, acquire land for any purpose connected with the performance of their functions, and they may be authorised by the Minister to acquire land compulsorily for any such purpose. Any land thus acquired must be disposed of by them.

In all these cases a public body may acquire land under statutory powers, and under the same powers dispose of the land to private persons, usually by sale or lease. Apart from such disposal, the public body could disregard the rights of third persons injuriously affected by their operations, in accordance with the principles explained in Part I of this paper, whenever the compensation clauses of the Lands Clauses Act, 1845, apply, *i.e.*, when the purchase is compulsory or when those clauses have been incorporated for the purpose of a purchase by agreement. But what is the position of the person to whom the public body has disposed of the land—we will call him the purchaser, including in the expression any person who occupies the land under the authority of the public body? Does the protection of the statute extend to him so as to give him a good defence against claims by third persons for damages or an injunction? Is he, on the other hand, liable for compensation? And, as between himself and the public body, who has ultimately to bear the burden of any compensation to which third persons may be entitled?

The problem was realised by the draftsman of the Town and Country Planning Act, 1944. This Act empowered local planning authorities to acquire compulsorily or by agreement land for the redevelopment of areas of extensive war damage or the relocation of the population or industries of such areas (s. 2) and also for the redevelopment of areas of bad lay-out and obsolete development (s. 9). These purposes involved the permanent use of the land by particular persons, and accordingly section 19 authorised the local planning authority, subject to certain restrictions, to dispose of the land held by them for any of the purposes mentioned. The draftsman's mind was thus directed to the position of the purchaser from the planning authority, and he dealt with it in section 22. The main provisions of the 1944 Act are no longer in force, having been superseded by the 1947 Act. Section 22, however, was kept alive by the later Act: the 1947 Act removed the dead powers of the 1944 Act from the section and engrafted instead the before-mentioned powers contained in sections 38, 40

and 43 of the 1947 Act (*i*). The section now provides that the erection, construction, carrying out or maintenance of any buildings or works, on land acquired or appropriated by a local authority or acquired by the Central Land Board for the before-mentioned purposes, whether done by the local authority or by any person deriving title under the local authority or under the Central Land Board, shall be deemed to be authorised if it conforms with planning control, notwithstanding that it involves interference with any easement or other servitude or breach of any restrictive covenant as to user, but subject to payment of compensation under section 63 or 68 of the Lands Clauses Consolidation Act, 1845.

The first thing to be noted is that the section does not confine its operation to works done by the purchaser from the public body, but includes works done by the local authority themselves (*k*). Insofar it might be thought to be superfluous, since it might be argued that the powers of the local authority to do such works follow from the sections of the Act authorising the purchase of the land (*i.e.*, ss. 38 and 40). But section 40 does not, on a purchase *by agreement*, incorporate the compensation provisions of the Lands Clauses Act, 1845, and, in accordance with what was said in Part I of this paper, cannot be considered as a sufficient basis for interference with third party rights. Section 22 of the 1944 Act in its new form supplies the necessary authority for interference with the rights of neighbouring landowners and at the same time gives them a right to compensation.

But the main importance of section 22 lies in the provision it makes for the case where the works are carried out by a purchaser from the public body. It makes it clear that "any person deriving title under the local authority or under the [Central Land] Board" who carries out work in conformity with planning control enjoys the same protection as the public body from whom he derives his title, and, on the other hand, is liable to pay compensation. The 1944 Act did not limit the protection to persons deriving title under the public body, but referred to "any other" person. This would include a contractor of the public body or a person acquiring the land by prescription. As regards a contractor he would appear to be protected as agent of the public body; a person acquiring title by prescription has no claim to protection.

The immunity, both of the public body and of a purchaser, is not limited by reference to the purpose for which the land was acquired, but extends to any work which conforms with planning

(*i*) s. 113, read in conjunction with the 11th Schedule.
(*k*) The Central Land Board are not authorised to execute works themselves.

control. The public body can, therefore, change the scheme, and, if planning permission for the new scheme is given, both the public body and the purchaser are still protected.

Section 22 of the 1944 Act deals also with compensation. The power to carry out works in disregard of third party rights is made "subject to payment of compensation under section 63 or 68 of the Lands Clauses Consolidation Act, 1845." This leaves it in doubt who is liable to pay compensation: the public body or the purchaser who carries out the work. The answer is found in subsection (2) of the section, which provides that any liability of a person other than the acquiring authority to pay compensation which that person fails to discharge shall be enforceable against that authority. It is thus made clear that the purchaser from the public body who benefits from the works causing injury to third parties is in the first instance liable for compensation. But the injured third party is not to suffer from his failure to pay, and the public body is therefore made a guarantor of his liability.

This leaves the question whether the public body can recover any amount so paid from the purchaser? Subsection (2) of section 22, after providing for the enforcement of the compensation liability against the public body, goes on to say that this is not to affect any agreement between the authority and any other person for indemnifying the authority against any liability under the subsection. The public body, when disposing of the land, can protect themselves against any loss from their liability for compensation, whether by taking such liability into account in fixing the terms of disposal or by stipulating for an indemnity from the purchaser. In the absence of such a stipulation the public body cannot claim to be indemnified by the purchaser.

Section 22 of the Town and Country Planning Act, 1944, forms a code determining both the powers of interference with third party rights and the liability for compensation in a case where a public body acquire land and dispose of it to a purchaser. This code was applied to land transactions under the New Towns Act, 1946, and, as mentioned, in a modified form, under the Town and Country Planning Act, 1947. There are, however, still many cases in which a public body acquire and dispose of land to which this code does not apply. An important example is section 79 of the Housing Act, 1936, under which a local authority may sell or lease houses or land acquired or appropriated for housing purposes. In such cases the following questions arise:—

(a) Is the purchaser protected against claims by third persons whose rights are injuriously affected, in the same way as the local

authority themselves would be? It must be borne in mind that the disposal of the land by the acquiring body to a purchaser is in our cases if not the necessary, at any rate the natural, mode of performing the functions for which they purchased it: the normal way of housing people is to grant them a tenancy of the premises which they are to occupy, and the normal way of attracting industry to a special area is to sell or lease them premises for their trade. If the consequence of such disposal were that the immunity against third party claims which the public body enjoyed were lost, this would be (in the words of Lord Cairns (*l*) quoted with approval by Lord Blackburn (*m*), when dealing with the immunity against third party rights enjoyed by the public body themselves) a *reductio ad absurdum*. It is true that the purchaser acquires the land for his own private purposes only, but he cannot help carrying out at the same time the purposes of the public body, and it is on account of these purposes, in right of the public body, that the protection must extend to the purchaser. Students of jurisprudence will be reminded of Duguit's doctrine denying the separate existence of a private law in modern society.

The protection of the purchaser extends as far as the protection of the public body. Purchases of land by a local authority for housing purposes are governed by the Local Government Act, 1933. We have seen that a local authority purchasing land by agreement are, under section 176 of that Act, not protected against third party claims, and consequently a purchaser is not protected either. The protection of both the public body and the purchaser will, as a rule, depend on the applicability of the compensation clauses of the Lands Clauses Acts.

(b) Provided, then, a third party whose rights have been injuriously affected can claim compensation: can he claim it from the public body, or from the purchaser, or from both? The answer depends on the enactment providing for compensation. Generally this enactment will consist of the compensation clauses of the Lands Clauses Act, 1845. These clauses show that the "promoter" is the person liable to pay compensation. The person who promotes the scheme is the public body who devise it and acquire land for the purposes of carrying it out. This is confirmed by para. 1 of the Second Schedule of the Acquisition of Land (Authorisation Procedure) Act, 1946—which applies in most of the relevant cases and governs, *e.g.*, the compulsory purchase

(*l*) *Hammersmith Ry.* v. *Brand* (1869) L.R. 4 H.L., at p. 215.
(*m*) *Hill's Case* (1881) 6 App.Cas., at p. 203.

of land under the Housing Acts, 1936 and 1949, and the Distribution of Industry Acts, 1945 and 1950. It provides that " references to the promoters of the undertaking (in the Lands Clauses Acts) shall be construed as references to the authority authorised by the compulsory purchase order to purchase the land."

Thus, the public body, after having disposed of the land, still remain liable for the compensation. It is submitted that this is so even if the work which causes the injury has been executed by the purchaser. The person who erects a house on land let to him by a local authority for that purpose, or who builds a factory on land sold to him for that purpose by the Board of Trade does so for his own private purposes, but, as mentioned before, he is at the same time the instrument through which the public body fulfil their scheme; as a rule, he will be under a contractual obligation to deal with the land in conformity with that scheme. Thus the work done by the purchaser is done on behalf of the public body, and they remain liable for compensation due to third persons.

Is the purchaser liable jointly with the public body? If the work was done before he purchased the land, he could be held liable only for injury caused by the use (as distinguished from the execution) of the works, but under the Lands Clauses Acts there is no right to compensation for such injury (*n*). If the purchaser executes the work himself, the position is more doubtful. But it is submitted that even in this case he is not liable to the injured party. Compensation is a statutory remedy, and unless the purchaser comes clearly within the words of the statute he cannot be held liable for compensation. The person liable under the Lands Clauses Act, 1845, for compensation is the " promoter " of the undertaking. Neither the natural meaning of the expression nor the definition (above referred to) given it by the Acquisition of Land (Authorisation Procedure) Act, 1946, would appear to include the purchaser, and the injured third party can therefore not claim compensation from him.

(c) Since the purchaser is neither a debtor of the compensation nor a co-debtor with the public body, there is no basis in quasi-contract for a claim by the public body against the purchaser for an indemnity or a contribution. But the public body, as mentioned before, will take their liability for compensation into consideration in fixing the terms of disposal of the land or by imposing on the purchaser a covenant for indemnity.

(*n*) *Ante*, note (*c*).

THE DESERTED WIFE'S LICENCE

By F. R. Crane, ll.b., Solicitor

Recent decisions, especially *Jess B. Woodcock* v. *Hobbs* (*a*) and *Westminster Bank, Ltd.* v. *Lee* (*b*), have brought substantial developments in the law concerning the deserted wife's rights in the matrimonial home owned by her husband, in relation to the husband's successors in title. As a result it is submitted that the following propositions can be formulated:—

1. The deserted wife's equity (such as it is—see proposition 2) arises on desertion and then binds all successors in title of the husband, other than bona fide purchasers for value without notice (see propositions 3 and 4).

2. The wife's right is merely to stay till ordered to leave by the court, which has jurisdiction to make such an order in its discretion at the suit of the husband or his successors.

3. The wife's right is only an equity, not an equitable interest, so the holder of an equitable as well as a legal interest can plead purchase for value without notice.

4. Occupation by the wife may not be by itself notice.

Proposition 1. *Deserted wife's equity binding on husband's successors in title.*

It was held in *Lloyds Bank, Ltd.* v. *Oliver's Trustee* (*c*) and *Barclays Bank, Ltd.* v. *Bird* (*d*) that the wife's right arose only on desertion and was therefore postponed to any previous legal or equitable interest. These decisions in the Chancery Division were generally welcomed, were accepted by Denning L.J. in *Woodcock* v. *Hobbs* (*e*), and are not likely to be reversed in the future.

The wife's equity has been considered in relation to subsequent purchasers three times since *Bendall* v. *McWhirter* (*f*). In *Street* v. *Denham* (*g*), where the deserting husband's mistress by arrangement purchased the matrimonial home for value with a view to

(*a*) [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.
(*b*) [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883.
(*c*) [1953] 1 W.L.R. 1460; [1953] 2 All E.R. 1443.
(*d*) [1954] Ch. 274.
(*e*) [1955] 1 W.L.R. at p. 156; [1955] 1 All E.R. at p. 449.
(*f*) [1952] 2 Q.B. 466; see Crane, "Licensees and Successors in Title of the Licensor" (1952) 16 *Conveyancer* 323, for a discussion of the law immediately after this decision.
(*g*) [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532.

getting the wife out, Lynskey J., contrary to his own inclination, considered himself bound by authority to hold that the purchaser, having notice, was bound. This decision was followed, again contrary to inclination, by Upjohn J. in *Westminster Bank, Ltd.* v. *Lee* (*h*); here the husband deserted his wife on or about September 2, 1948, and on November 9 created an equitable charge in favour of the bank, who did not learn that he had left her till December (*i*). The facts in *Woodcock* v. *Hobbs* (*k*) were slightly more complicated: the husband, a tenant, deserted his wife in 1940 and in 1948 purchased the freehold which was compulsorily acquired by the British Transport Commission in 1950. When the Commission wrote to the wife she merely passed the letters on to her husband, who replied that she resided as a caretaker. The Commission sold to the plaintiffs in 1954, the contract being expressly subject to the wife's occupation as caretaker. Denning and Birkett L.JJ. held the wife's equity binding on the plaintiffs, though Parker L.J. did not agree. Consequently it seems that in a court of first instance certainly, and in the Court of Appeal probably, the deserted wife's equity will be held to bind successors in title other than purchasers for value without notice.

Proposition 2. *Wife's occupation always terminable at discretion of court.*

Since *Errington* v. *Errington* (*l*) and *Bendall* v. *McWhirter* (*m*) comment has tended to concentrate on the occupational licence as such and the possibility of licences in general having effect in some cases as equitable interests in land. Less attention has been paid to the fact that in *Bendall* v. *McWhirter* all three members of the Court of Appeal were at pains to point out that the husband's trustee in bankruptcy could apply to the court to terminate the wife's occupation (*n*). *Woodcock* v. *Hobbs* (*o*) now underlines this point, because the Court of Appeal there held unanimously that the court would, in proceedings for possession by the purchaser, exercise its discretion and order the wife out. The basis of the discretion is either section 17 of the Married Women's Property

(*h*) [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883.

(*i*) There was an agreement for a loan on or about September 2, overdrawing began on September 9, and the equitable charge followed the payment off of a legal mortgage. The attempt to argue that the bank's interest preceded that of the wife, by subrogation, was rejected.

(*k*) [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445; other points in this case are discussed later in this article.

(*l*) [1952] 1 K.B. 290; discussed (1952) 16 *Conveyancer* 323.

(*m*) [1952] 2 Q.B. 466.

(*n*) [1952] 2 Q.B. at pp. 470–4, 483–4 and 488. The point was considered by Sheridan, "Licences to Live in Houses" (1953) 17 *Conveyancer* at pp. 463–4.

(*o*) [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.

Act, 1882, or the general jurisdiction of the court, or both. Each seems somewhat difficult to justify and there is no other interest quite comparable to the wife's as now constituted—an equity during the discretion of the court (*p*). The decision has, however, the great practical advantage of preventing the wife's right being either decreased or (because of procedural difficulties) increased on a sale, etc. In *Westminster Bank, Ltd.* v. *Lee*, an action for possession in the enforcement of the equitable mortgage, the existence of the discretion was conceded by counsel and accepted by the court without question (*q*). Interest is now likely to shift to the practice of the court in the exercise of discretion. Here the earlier cases are irrelevant because the point was not considered. In *Woodcock* v. *Hobbs* Denning L.J. said (*r*): "In a case where a husband conveys the home to his mistress, or to a friend, at a low price simply to defeat the wife's right, the court would no doubt refuse to order her to go. It would not lend its aid to such a proceeding. But in the case where the husband sells the home to a purchaser who buys in good faith at a fair value, not knowing of the wife's right (but subject to it only because he is taken by law to have notice of it) the court would, I think, be disposed to order her to go, but it would do what it could to lessen the hardship on her." In the event, the wife was ordered to go in three months (as opposed to the usual 28 days). Denning L.J. also remarked that the wife "innocent as she is, cannot be left there much longer without paying rent" (*s*), while Birkett L.J. said: "It is plain that the deserted wife cannot claim to have a perennial tenancy whereby she can stay there and never be removed in any circumstances" (*t*). But, with respect, is not indefinite occupation just what the court has given her against a husband entitled in fee simple? In *Westminster Bank, Ltd.* v. *Lee* Upjohn J. said (*u*) that "as a practical matter, therefore, the case lies in a narrow compass and it ultimately becomes a question of how long the wife will be allowed to remain in possession; but, if the wife can establish that she has some equity having priority over the mortgage, that will enable her to plead with some force for a longer period, *by some months* (*a*), than if she has no right as against the mortgagee." The mortgagee bank asked for and obtained an order for possession

(*p*) See case note, *ante*, at p. 149.
(*q*) [1955] 3 W.L.R. at p. 379; [1955] 2 All E.R. at p. 886.
(*r*) [1955] 1 W.L.R. at p. 157; [1955] 1 All E.R. at pp. 449–50; Birkett and Parker L.JJ. agreed with Denning L.J.'s view of what should be done in the instant case.
(*s*) [1955] 1 W.L.R. at p. 157; [1955] 1 All E.R. at p. 450.
(*t*) [1955] 1 W.L.R. at p. 159; [1955] 1 All E.R. at p. 451.
(*u*) [1955] 3 W.L.R. at p. 379; [1955] 2 All E.R. at p. 886.
(*a*) The italics are the present writer's.

three months after accounts had been taken. It looks, therefore, as if a purchaser with only constructive notice of the deserted wife's occupation may expect to get possession in a few months; as to others, *quaere* (*b*). The effect on the exercise of the court's discretion of an order under the Married Women's Property Act, 1882, s. 17, restraining the husband from dealings, also remains to be considered. So far the relevant dealing has preceded such an order (*bb*).

Proposition 3. *Wife's right an equity not an equitable interest.*

As between equitable interests the general rule of priority is that the first in time prevails, unless the holder of the prior equity in point of time has been guilty of some conduct whereby he should be postponed (*c*). Notice is irrelevant. If, however, there is a mere equity, the subsequent holder of an equitable as well as a legal interest can plead purchaser for value without notice (*d*). Until now the only example of a mere equity appears to be the right to have a deed rectified or set aside (*e*); beneficial interests under trusts (*f*), equitable mortgages (*g*), vendor's liens (*h*), restrictive covenants (*i*) and estate contracts (*k*) are all equitable interests. There is, of course, no statutory or judicial definition—classification depends on the qualities of the right concerned. Apart from the matter of priority, the common feature of equitable interests appears to be that they are immediately enforceable against the land through the estate owner for the time being whereas until rectification even the court must act on the deed as it stands (*l*). On this basis the deserted wife's right seems closer to an equitable interest. Nevertheless, in *Westminster Bank, Ltd.* v. *Lee* (*m*) it was held to be a mere equity, so that the bank, as equitable mortgagee, could plead purchaser for value without notice. Upjohn J.

(*b*) See *post*, p. 348, for further remarks on this matter.

(*bb*) *Westminster Bank, Ltd.* v. *Lee, supra*; *Barclays Bank, Ltd.* v. *Bird* [1954] Ch. 274.

(*c*) *e.g.*, *Rice* v. *Rice* (1854) 2 Drew 73; *Phillips* v. *Phillips* (1862) 4 De G.F. & J. 208; *Cave* v. *Cave* (1880) 15 Ch.D. 239.

(*d*) *Phillips* v. *Phillips, supra*; *Cave* v. *Cave, supra.*

(*e*) See *Phillips* v. *Phillips* and *Cave* v. *Cave, supra*; Halsbury's *Laws of England*, 2nd ed., Vol. XIII, at pp. 95, 96—but compare language at p. 112.

(*f*) *Cave* v. *Cave, supra.*

(*g*) *Rice* v. *Rice, supra.*

(*h*) *Mackrell* v. *Symons* (1808) 15 Ves. 329.

(*i*) *Re Nisbett and Potts Contract* [1906] 1 Ch. 386.

(*k*) *Wright* v. *Dean* [1948] Ch. 686 at p. 693.

(*l*) *Re Malet* (1862) 30 Beav. 407—payment out of court to trustees of settlement, where it was recognised that a fund was wrongly included in covenant to settle after acquired property, but there was no jurisdiction to rectify in those proceedings.

(*m*) [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883.

based his view partly on language used in *Bendall* v. *McWhirter* (*n*) and partly on the fact that the contractual licensee's protection in *Winter Garden Theatre (London), Ltd.* v. *Millennium Products, Ltd.* (*o*) was based on contract not property. The former ground seems, with respect, stronger than the latter, because equitable interests, *e.g.*, restrictive covenants, can be merely matters of contract between the parties. However, the point was *res integra*, and the decision has considerable commercial advantage, especially when coupled with proposition 4 below. Moreover, it avoids the possible difficulty created by the Law of Property Act, 1925, s. 4 (2), which says that an equitable interest in land can only be created where a valid equivalent interest in real or personal property could have existed before 1926 (*p*).

Proposition 4. *Occupation by the deserted wife may not by itself be notice.*

Possession by a tenant or stranger gives constructive notice of all his rights (*q*). Curiously enough, the courts do not ever seem to have had to decide whether this applies to occupation under family settlements or trusts so as to give a purchaser notice of beneficial interests (*r*), so that the position of the deserted wife rests only on the recent cases. In *Bendall* v. *McWhirter* Denning L.J. said (*s*), *obiter*, that her occupation was notice, but in *Westminster Bank, Ltd.* v. *Lee* Upjohn J. thought this too wide (*t*). Pointing out that the rule is only an application of the principle that a purchaser must make proper inquiries, he held that a purchaser or mortgagee with no reason to suspect matrimonial differences or absence by the husband need not make any inquiries as to desertion, and would not have constructive notice. To hold otherwise "would bring thousands of business transactions into the area of domestic life and ties. That could not be right." Any further facts—such as the letter written to the bank in the instant case by the husband stating that he had left home—might put him

(*n*) [1952] 2 Q.B. 466; Romer L.J. said she had "no legal or equitable interest in the home" (p. 485) and Denning L.J. spoke of an "equity" (at p. 484).

(*o*) [1948] A.C. 173.

(*p*) See (1952) 16 *Conveyancer* at p. 342, and (1953) 17 *Conveyancer* at pp. 458–9.

(*q*) *Hunt* v. *Luck* [1901] 1 Ch. 45; *Allen* v. *Anthony* (1816) 1 Mer. 282; *Daniels* v. *Davison* (1809) 16 Ves. 249; *Smith* v. *Jones* [1954] 1 W.L.R. 1089; [1954] 2 All E.R. 823.

(*r*) The point was raised but not decided in *Penny* v. *Watts* (1849) 1 Mac. & G. 150 and *Nelson* v. *Holgate* (1844) 1 Coll. 203; see, too, *Lloyds Banking Co.* v. *Jones* (1885) 29 Ch.D. 221—no need to inquire if married women had made a settlement.

(*s*) [1952] 2 Q.B. 466 at p. 483.

(*t*) [1955] 3 W.L.R. 383; [1955] 2 All E.R. 883, at pp. 889–90.

on enquiry. Unfortunately the learned judge did not on this point consider *Woodcock* v. *Hobbs*. There the purchasers, though not aware of the desertion, knew the husband did not live on the premises and had been told a "hardly credible" story about the wife being a caretaker and "took their chance" (*u*). The Court of Appeal held they had constructive notice. Therefore, it is submitted, that on this matter the validity of *Westminster Bank, Ltd.* v. *Lee* must depend on what is eventually determined to be the *ratio decidendi* on this point of *Woodcock* v. *Hobbs*—occupation by the wife, or an improbable story by the husband. If mere occupation is sufficient, the only really safe course will be to obtain vacant possession or the wife's assurance (by joining in the transaction or otherwise) that she makes no claim.

Comment.

A number of points may be made. First, it may be that in practice a deserted wife will not get more than a few months' grace from the court in an action by her husband's purchaser or mortgagee. In that event virtually the same position could, it is submitted, have been reached by a much more orthodox route. The wife's licence, though irrevocable by her husband except by an order of the court under the Married Women's Property Act, 1882, could have been held revocable by successors in title, subject to the settled rule that reasonable notice of revocation must be given (*a*). Such notice may need to give not merely time to pack up and leave premises, but also time to make alternative arrangements—in the *Winter Garden* case Lord Porter went so far as to say it might extend to the run of a play if no alternative accommodation could be found (*b*). Here, surely, is ample jurisdiction to give the wife all she seems likely to get under the law as actually developed without any of the juridical difficulties (*c*). There is, however, one procedural difference. Reasonable notice must be estimated by the licensor and notice given; if it is inadequate the licensee need not comply but must nevertheless begin to go, for if a reasonable time has elapsed when an action is brought the licensor will be given

(*u*) [1955] 1 W.L.R. at p. 156; [1955] 1 All E.R. at p. 449.

(*a*) *e.g.*, *Webb* v. *Paternoster* (1618) Popham 151; *Cornish* v. *Stubbs* (1870) L.R. 5 C.P. 334; *Canadian Pacific Ry.* v. *Rex* [1931] A.C. 414; *Winter Garden Theatre (London), Ltd.* v. *Millennium Products, Ltd.* [1948] A.C. 173; *Aldin* v. *Latimer Clark, Muirhead & Co.* [1894] 2 Ch. 437 (successors in title).

(*b*) [1948] A.C. at pp. 196–7.

(*c*) In this event the decisions in *Street* v. *Denham* [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532 and *Ferris* v. *Weaven* [1952] 2 All E.R. 233 (in each of which possession was refused) would have to be regarded as based on collusion—the view preferred by Parker L.J. in *Woodcock* v. *Hobbs*.

possession (*d*). At present the court has to be asked to determine the extent of the wife's occupation. Yet if, as seems probable, negotiations precede the writ and are taken into account in the exercise of the court's discretion, the actual result may be much the same.

Secondly, the deserted wife's licence has been tailored to fit both the primary principle of the 1925 legislation, that all land should be freely transferable, and also current conveyancing practice. It seems now unlikely to place any substantial restriction on the deserting husband's proprietary rights, or to require any substantial change in the steps at present taken in the investigation of title. It could not be right, said Upjohn J. in *Westminster Bank, Ltd.* v. *Lee* (*e*), "to bring thousands of business transactions into the area of domestic life and ties." With respect, may it not equally be asked whether our law of property should, as it does, leave the matrimonial and family home, both before and after desertion, at the mercy of the improvident or impecunious husband? In the United States of America most states have enacted "homestead" law in giving a special legal status to the matrimonial home. Generally "the homestead laws seek to assure a permanent common home for the members of a family by setting apart property belonging to the head of a family up to a stated amount, and immunising this property from the claims of creditors and from the misfortunes or improvidence of the person who is the head of the family" (*f*). Mortgages to enable the property to be purchased are usually excepted from these laws (*g*). Almost invariably one aspect of this protection is a statutory provision prohibiting the conveyance or mortgaging of the homestead lands except when both husband and wife concur in the transaction (*g*). Might it not now be appropriate to consider whether legislation on these lines would be desirable here?

Thirdly, the gulf between the deserted wife's licence and contractual licences is now wide, for the latter cannot be made the subject of a special discretion in the court. They may still be a new equitable interest in land. The law here still depends on the effect of the decisions culminating in *Bendall* v. *McWhirter* (*h*).

(*d*) *C.P.R.* v. *Rex*, *supra*; *Ministry of Health* v. *Bellotti* [1944] K.B. 298.

(*e*) [1955] 3 W.L.R. at p. 384; [1955] 2 All E.R. at 889; and see *Barclays Bank, Ltd.* v. *Bird* [1954] Ch. 274, *per* Harman J., at p. 279, "any extension of this (the wife's) privilege may in the end prove detrimental to the public interest because money will not be lent to men who have houses. . . ."

(*f*) Powell on *Real Property* (1950), Vol. 2, at pp. 401, 402; see also the extensive account in Vol. 40 of the *Corpus Juris Secundum* (a sort of Halsbury of American law), and a note on "State Homestead Exemption Laws" (1937) 46 *Yale Law Journal* 1023, which shows that similar laws exist in a number of other countries also.

(*g*) Powell, *op. cit.* (*h*) [1952] 2 Q.B. 466; see (1952) 16 *Conveyancer* 323.

REGISTERED LAND—RECTIFICATION AND INDEMNITY

A Decision of the Chief Land Registrar

By Theodore B. F. Ruoff, Solicitor

On a previous occasion (*a*) the writer attempted to enunciate the principles that govern the guarantee of registered titles by the State. In particular, the writer expressed the view that the very act of first registration of a man's title cures anterior defects and establishes his title conclusively so that thenceforth, prima facie, it becomes an unassailable title. But if, owing to the impact of the general law (as, for example, through an order of the court) the registered owner is deprived of his land, he is entitled to be paid the full value of it out of the Land Registry insurance fund. This result flows from the fact of registration whether or not the registered proprietor's title happened to be a sound one before first registration took place (*b*).

Recently there have been proceedings before the Chief Land Registrar which illustrate these principles. These arose out of the purported sale to two rival purchasers of the same plot of freehold land, no question of fraud being involved. The land was originally held, under an unregistered title, by A, a gentleman who owned a great deal of land in the neighbourhood. It consisted of a vacant plot fronting upon a road which, in due course, was made up by the local authority. This body was ignorant of A's ownership so that when the expenses of making up the road were finally apportioned A was not personally notified of the fact. Instead, notice of the liability was posted on the land.

The road charges remained unpaid and in 1936 the local authority, in exercise of its statutory power of sale (*c*), conveyed the land to a purchaser, P, for £50. This conveyance operated to override all prior interests in the land. Then P died in 1938 and his wife, W, became entitled to the land as his personal representative. Owing to the war and to post-war restrictions upon building

(*a*) 18 *Conveyancer* (N.S.) 130.

(*b*) *Cf. Re 139 Deptford High Street* [1951] 1 Ch. 884. The order for payment of indemnity was made by the Chief Land Registrar and is therefore not mentioned in the report.

(*c*) Private Street Works Act, 1892, s. 13, as amended by the Public Health Act, 1925, and the Law of Property Act, 1925.

the land remained undeveloped. It was situated in an area where registration of title on sale was not compulsory and W's title was, and remained, an unregistered one.

Then, in 1951, A, the original landowner, knowing nothing of what had happened, purported to convey the self-same land to X for value. It is noteworthy that at this time there was no entry in the register of local land charges (as, indeed, there could not properly then be) to draw the attention of X's solicitors to the private street works charge that had previously existed (*d*), and there was no conveyancing machinery through which they could have become aware of this fatal defect in his title. In 1954 X purported to convey the land to Y for £215. By this time the district in which the property was situated had become a compulsory area and therefore Y (as he was bound to do) applied for first registration of his title and was registered with absolute title.

The consequence of his doing so was that the legal estate in fee simple in possession became vested in Y (*e*) and therefore, presumably, W, who up to that moment had been the true owner, was instantly and unwittingly divested of her unregistered estate. Y, however, held his estate against all comers unless and until such time as the High Court or the Chief Land Registrar might be induced to order that he should be divested of it by rectification of the register (*f*).

After completing his purchase Y began to erect a house on his land and to that end he executed a mortgage in favour of M under which £750 was actually advanced to him and £1,500 in all was to be advanced to him by instalments as the building proceeded. Not long afterwards W noticed these happenings upon what she obviously regarded as her land, and through her solicitors she applied to the Chief Land Registrar for rectification of Y's title in her favour on the grounds that the property had been validly conveyed to her testator by the local authority (*g*). Hence, there being a question, doubt, dispute, difficulty or complaint, the Chief Land Registrar arranged to hear the disputants (*h*).

In passing, it may be of interest to note that had Y's title been an unregistered one, a series of claims would undoubtedly have ensued from W's discovery, following each other in quick succession like a pack of standing cards knocked down by a child. It is reasonable to suppose that W would have sought to recover her

(*d*) In Part II of the register kept under the Land Charges Act, 1925, s. 15.
(*e*) Land Registration Act, 1925, ss. 5, 69 (1); *Morelle, Ltd.* v. *Wakeling* [1955] 2 W.L.R. 672 (C.A.), at p. 689.
(*f*) *Cf.* Land Registration Act, 1925, s. 82 (2).
(*g*) See Land Registration Act, 1925, s. 82 (1) (g) and (h).
(*h*) Land Registration Rules, 1925, r. 298.

land from Y and that she would have been successful. M would look to Y for the mortgage moneys that had been advanced. Y could have sued X on the implied covenants for title, claiming the price he had paid and, also, presumably, the money thrown away on useless building, and X, in turn, would have had recourse against A on the implied covenants and, possibly, for negligence. Possibly Y would have sued A directly (*i*). Although some of these claims might have been amalgamated by means of the third party procedure, it is unquestionable that a number of persons would have been involved (or would have been in jeopardy of being involved) in expensive litigation, and it is more than likely that some of the persons concerned would in the end have incurred irrecoverable losses. On the other hand, of course, had A's title originally been a registered one, the problem discussed in this article could not possibly have arisen.

As it was, however, the speedy and cheap procedure of rectification proceedings before the Chief Land Registrar was available to the parties. Rectification was opposed by Y, the registered proprietor, and by M, the registered chargee, upon the grounds that Y was in possession of the land which was registered in his name. The provisions of the Land Registration Act, 1925, which are germane to Y's contention (*k*), provide that:

"The register shall not be rectified . . . so as to affect the title of the proprietor who is in possession—

"(a) unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the mistake or omission in consequence of which such rectification is sought; or

"(b) unless the immediate disposition to him was void . . .; or

"(c) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him."

Y, who was undoubtedly in physical occupation of the land, argued that as he had (by his solicitors) investigated the unregistered title with every care and normal precaution and could not possibly have discovered the flaw in the title, he did not fall within the terms of paragraph (a) above. As to (b), he alleged that the conveyance to him at least conveyed such possessory title (if any) as his vendor had. And in any event it will be noticed that paragraph (b) does not require rectification to be ordered automatically

(*i*) See *Stoney* v. *Eastbourne Rural District Council* [1925] 1 Ch. 367, C.A.; *David* v. *Sabin* [1893] 1 Ch. 523.

(*k*) Land Registration Act, 1925, s. 82 (3).

against a person whose holding depends upon a void disposition. As to paragraph (c), Y claimed that no injustice would be caused if his proprietorship was allowed to remain. On the contrary, he alleged that justice required that there should be no rectification. After hearing both parties by their solicitors the Chief Land Registrar refused to rectify the register and made an order confirming Y in his proprietorship.

As a result of this order W claimed that she had suffered loss and asked to be indemnified under the following provision of the Act, namely (*l*):—

"Where an error or omission has occurred in the register, but the register is not rectified, any person suffering loss by reason of such error or omission shall, subject to the provisions of this Act, be entitled to be indemnified."

W's claim was for the value of the land she had lost as at the date of registration of Y as proprietor (*m*), and was based on the valuation of a licensed valuer (£500), plus the valuer's fee (£5 5s.). This value was subject to a check by the district valuer and was reduced by him to £300. She also claimed Y's costs of the hearing before the Chief Land Registrar, after they had been taxed (at about £37) by a taxing officer of the Supreme Court (*n*), and her own costs of the hearing (about £27) (*o*), and she asked the Chief Land Registrar to award indemnity accordingly (*p*). After examining this claim the Chief Land Registrar, without calling for additional evidence or argument, forwarded it for the attention of the trustees of the Land Registry insurance fund, and in due course he made an order for payment of W's claim on the basis of the reduced valuation.

Finally, it may be noticed that the remedies of rectification and indemnity are entirely complementary to one another so that there is little doubt that if the position had been reversed and W had been granted rectification, Y would have been entitled to compensation for the loss of his land (*q*).

(*l*) Land Registration Act, 1925, s. 83 (2).
(*m*) *Cf. ibid.*, s. 83 (6) (a).
(*n*) *Ibid.*, s. 17 (1); Land Registration Rules, 1925, r. 341.
(*o*) *Cf.* Land Registration Act, 1925, s. 83 (8).
(*p*) *Ibid.*, s. 83 (7).
(*q*) Under *ibid.*, s. 83 (1). This is exactly what happened in *Re 139 Deptford High Street* (*ante*, p. 350).

THE RATING AND VALUATION (MISCELLANEOUS PROVISIONS) ACT, 1955

By K. F. Goodfellow, M.A., LL.B., Barrister-at-Law

New valuation lists are due to come into force throughout England and Wales on April 1, 1956 (*a*). They will replace the valuation lists currently in force, which were prepared before the outbreak of the Second World War. The principal purpose of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, is to amend the law according to which the new valuation lists will be prepared: the Act does not, in general, require any alteration to be made in any current valuation list (*b*). The Act is the fourth Act of Parliament dealing with rating and valuation to be passed since the war (*c*) and, as its title implies, it makes a number of minor alterations in the law rather than any one major change. The amendments contained in the Act are both substantive and procedural and may conveniently be considered under these two headings.

(A) Substantive Amendments

(1) *Ascertainment of Net Annual Value*

The Rating and Valuation Act of 1925 divided hereditaments outside the County of London into two categories for the purpose of determining net annual value (*d*). In the case of hereditaments specified in Part I of the Second Schedule to the Act a gross value was first to be determined. From the gross value was to be deducted the amounts or percentages specified in the Second Schedule in respect of repairs, insurances and other expenses together with average annual amount (if any) of "the drainage rates" in order to arrive at the net annual value. In the case of all other hereditaments the net annual value was to be directly determined by calculating "the rent at which the hereditament might reasonably be expected to let if the tenant undertook to

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(*a*) See the New Valuation Lists (Postponement) Act, 1952; New Valuation Lists (Postponement) Order, 1954 (S.I. 1954, No. 272); s. 34 (1) of the Local Government Act, 1948, as amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

(*b*) s. 17 (2).

(*c*) The three earlier Acts are the Local Government Act, 1948, the New Valuation Lists (Postponement) Act, 1952, and the Valuation for Rating Act, 1953.

(*d*) s. 22 (1).

pay all the usual tenant's rates and taxes . . . and to bear the cost of the repairs and insurance and other expenses, if any, necessary to maintain the hereditament in a state to command that rent " (*e*).

The Act of 1955 retains these two categories, but by section 5 has altered the hereditaments from whose gross value a fixed deduction is to be made and has also altered the amounts and percentages to be deducted. The first category of hereditaments now includes for the purpose of any new valuation lists ". . . one or more houses or other non-industrial buildings, with or without any garden, yard, court, forecourt, outhouse or other appurtenance belonging thereto, but without other land . . ." (*f*). The expression " house " includes a part of a house, and in relation to a dwelling-house, school, college or other educational establishment, the expression " appurtenance " includes " all land occupied therewith and used for the purposes thereof " (*g*).

A " non-industrial building " is defined as " a building, or part of a building of any description, with the exception of factories, mills and other premises of a similar character used wholly or mainly for industrial purposes, and of premises valued as part of (a) a railway, dock, canal, gas, water or electricity undertaking, or (b) any public utility undertaking not falling within the preceding paragraph " (*h*).

All hereditaments not specifically included in the first category fall within the second. In the result therefore the only hereditaments which now fall within the second category are those consisting of land without buildings, or of buildings which are used for industrial purposes, (*i*) or of premises which fall within (a) and (b) above.

The chief practical effect of these amendments is that whereas hitherto hereditaments consisting of land without buildings have been within the first category, in future they will fall within the second category and their net annual value will be directly determined without the preliminary step of calculating their gross value.

Of more importance, perhaps, is the fact that the two categories

(*e*) s. 22 (1) (b).

(*f*) s. 22 (1) (a) of the Act of 1925, as amended.

(*g*) s. 22 (4) as amended.

(*h*) s. 22 (4) as amended: " factories, mills and other premises of similar character used wholly or mainly for industrial purposes " may be " industrial hereditaments " within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, and so qualify for derating, but need not necessarily be so.

(*i*) *i.e.*, " factories and mills and other premises of similar character used wholly or mainly for industrial purposes."

of hereditaments specified by the Act of 1925 as amended by the Act of 1955 now apply to hereditaments within the County of London also. Formerly the calculation of the gross and net annual values of hereditaments within the County of London was governed by the provisions of the Valuation (Metropolis) Act, 1869 only. Henceforth, however, the only difference between hereditaments within and without the County of London will lie in the fact that the fixed deductions to be made from the gross value of hereditaments within the first category are slightly more generous within the County of London than are those for the remainder of England and Wales.

The fixed deductions now prescribed may be altered in the future. Section 5 of the Act of 1955 empowers the Minister of Housing and Local Government by order to alter or amend them. The draft order must, however, be approved by a resolution of each House of Parliament (*j*).

Dwelling-houses, private garages and private storage premises as defined by the Valuation for Rating Act, 1953, come within the first category. In their case, however, the full average annual amount of any "drainage rates" will not be deducted from their gross values, but only one third of such amount (*k*).

(2) *Places of Public Religious Worship*

The extent of the exemption from rates which is currently enjoyed by places of public religious worship is governed by the Poor Rate Exemption Act, 1833. As soon, however, as new valuations have been prepared and come into force, the extent of the exemption will be governed by the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Section 7 of the Act of 1955 provides that from the date of the coming into force in any rating area of the first new valuation list after the passing of the Act, the Poor Rate Exemption Act, 1833, shall cease to have effect (*l*), but that the following hereditaments shall not, in general, be liable to be rated:

> "(a) places of public religious worship which belong to the Church of England or to the Church in Wales (within the meaning of the Welsh Church Act, 1914) or which are for the time being certified as required by law as places of religious worship (*m*), and

(*j*) s. 5 (5).
(*k*) s. 5 (7). Special provision is made for hereditaments which are only partly residential.
(*l*) s. 7 (4). The whole of the Act is repealed as from that date: s. 15 and Part II of the Eighth Schedule.
(*m*) See the Places of Worship Registration Act, 1855.

(b) any church hall, chapel hall or similar building used in connection with any such place of public religious worship and so used for the purposes of the organisation responsible for the conduct of public religious worship in that place" (*n*).

The exemption also extends to a hereditament consisting partly of buildings falling within (a) and partly of buildings falling within (b). The express mention of a mixed hereditament, such as most commonly occurs, indicates that the expression "in connection with" in (b) does not postulate a physical connection, but that a church hall which is several streets away from the church itself can qualify for exemption so long as the activities there carried on are connected with the life of the church. It will be observed that the activities of the church hall need not be conducted by "the organisation responsible for the conduct of public religious worship" itself: it is sufficient if those activities are for the purposes of that organisation. It would seem therefore that so long as the activities, although not specifically religious themselves, further the religious purposes of the church, the building where they take place may be exempt from rates.

The requirement of the Poor Rate Exemption Act, 1833, that the worship be public is retained, so that collegiate and school chapels will be in no better position than formerly. The requirement of "exclusive appropriation" contained in the Act of 1833 is no longer preserved. It would indeed appear that whilst activities carried on in a building falling within (b) must be related to the religious purposes of the church, buildings falling within (a) can be used for altogether secular purposes so long as they are also used for public religious worship. Dances held in the church itself will not render the church liable to be rated: they are more likely to render the church hall liable to be rated if held there.

Subsection (3) of section 7 does, however, provide that hereditaments within (a) and (b) shall be liable to be rated in certain circumstances. Broadly the subsection is designed to make such hereditaments rateable to the extent to which they are let at a profit. The following conditions must be satisfied before such a hereditament can be rated:

(1) The hereditament, or part of it, must have been let (*o*) for use other than as a place of public worship, in the case of a hereditament falling within (a), or for a use not both connected with and for the purposes of the organisation

(*n*) s. 7 (2).
(*o*) "whether by way of a tenancy or of a licence": s. 7 (3).

responsible for the conduct of public religious worship, in the case of a hereditament falling within (b).

(2) A payment in consideration of such letting must have accrued due in the last year (*p*) before the rate period (*q*) in question.

(3) The average annual amount of payments accruing due in respect of such lettings must exceed the average annual amount of the expenses attributable to those lettings.

If the above three conditions are all satisfied, then a gross value is to be ascribed to the hereditament, but is to be assessed by reference only to the amount by which the average annual amount of payments exceeds the average annual amount of expenses. There is, however, no indication in the Act as to the number of years over which the average is to be taken, nor what is to be done if such lettings occur in one isolated year only.

(3) *Charitable and other Organisations*

Section 8 of the Act of 1955 confers a new relief from rates upon charitable organisations and upon certain other similar organisations. The relief will operate from the year beginning with the date of the coming into force of the first new valuation lists and thereafter (*r*).

It was the practice of local authorities when formerly they were charged with the task of assessing rateable values to give "sympathetic assessments" to hereditaments occupied by charitable organisations or by other non-profit making organisations existing for the public benefit so as to minimise their liability for rates. The valuation lists currently in force (which were prepared before the Second World War) reflect this practice. The making of valuations and assessments is now, however, the task of valuation officers of the Commissioners of Inland Revenue whose task it will also be to prepare the new valuation lists in accordance with the provisions of the Local Government Act, 1948 (as amended by the Rating and Valuation Act, 1953, and by the Rating and Valuation (Miscellaneous Provisions) Act, 1955). It was feared that if no special provision were made, the making of realistic assessments at present inflated values would inflict a sudden and perhaps crippling additional burden of rates upon such charitable

(*p*) "'year' (except where otherwise defined or where the reference is expressly to a calendar year) means a period of twelve months beginning with the first day of April": s. 16 (1).

(*q*) "'rate period' means a year or part of a year, being a year or part of a year for which a rate is made": s. 16 (1).

(*r*) Such relief is in addition to and not in substitution for any exemption or privilege which already exists: s. 8 (6).

and other organisations (*s*). Provision to " soften the blow " has therefore been made by section 8.

Hereditaments within section 8

Section 8 applies to the following hereditaments:

" (a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or otherwise concerned with the advancement of religion, education or social welfare:

(b) any hereditament held upon trust for use as an almshouse:

(c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators, to the playing field " (*t*).

The Act of 1955 contains no definition of the word " charitable." Doubtless, however, recourse will be had to the considerable body of law relating to the definition of a charity for the purposes of both trusts and income tax in order to determine whether the objects of an organisation are charitable within the meaning of section 8. The law of charities, has, however, developed certain technical and narrow distinctions, and it would appear that the express inclusion of organisations " otherwise concerned with the advancement of religion, education or social welfare " is intended to prevent such distinctions from being imported into the law of rating. For example, whilst it has been held in *Gilmour* v. *Coats* [1949] A.C. 426 that a gift to a Carmelite convent of strictly cloistered and purely contemplative nuns is not a gift upon a charitable trust because it lacks the element of public benefit, there would seem to be no reason why such a convent should not fall within the ambit of section 8 as being " a hereditament occupied for the purpose of an organisation . . . which is not established or conducted for profit and whose main objects are . . . concerned with the advancement of religion. . . ."

In the law of charities the term " education " has been liberally

(*s*) Although it is true that a general increase in rateable values should produce a reduction in the amount of the rate per pound, the loss of a " sympathetic assessment " would increase the burden substantially.

(*t*) s. 8 (1).

construed (*u*) and there seems to be nothing in section 8 to restrict the term to conventional education.

Privately owned and public schools which would otherwise be within the section may fail to qualify for treatment under the section as being "established or conducted for profit." It would appear that an organisation will not qualify for treatment under section 8 merely by showing that it has made no profit for a number of years; it must show that it is not even conducted with a view to making a profit.

It should be remembered, however, that section 64 of the Education Act, 1944, does provide a distinct and total exemption from rates for "voluntary schools." If a school is entitled to the benefit of section 64 of the 1944 Act, it will be quite unnecessary to consider whether it is also within the terms of section 8 of the 1955 Act.

The expression "social welfare" is so general as to make it virtually a matter of opinion whether or not any organisation has as its main objects "the advancement of . . . social welfare." It would appear, however, to be akin to Lord Macnaghten's fourth division of charities, "trusts for other purposes beneficial to the community": *Income Tax Commissioners* v. *Pemsel* [1891] A.C. 531, 583.

Almshouses are specifically included within section 8 although in the great majority of cases they would in any event fall within the section as hereditaments occupied for the charitable object of the relief of the aged poor.

The description of a "playing field" as "land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports" is perhaps somewhat wider than the general meaning of the expression. If this description is applied, an open-air swimming pool would appear to qualify for treatment as a playing field.

Hereditaments Specifically Excluded

There is a general proviso to section 8 excluding "any hereditament to which section seven applies" (*v*) and "any hereditament occupied by an authority having within the meaning of the Local Loans Act, 1875, power to levy a rate." The effect of the second exception is to exclude hereditaments occupied both by local authorities having a direct power to levy rates and also by local

(*u*) *e.g.*, *Re Dupree's Trusts* (1945) 114 L.J.Ch. 1 (a trust to promote chess playing by boys held charitable); *Re Shakespeare Memorial Trust* [1923] 2 Ch. 398 (a trust to endow the Shakespeare Memorial Theatre held charitable); *cf. Bonar Law Memorial Trust* v. *Commissioners of Inland Revenue* (1933) 49 T.L.R. 220 (a trust which permitted purely party political lectures held not charitable).

(*v*) *i.e.*, places of religious worship.

authorities having power to raise money by precepts directed to local authorities having a direct power to levy rates (*w*).

One of the most important effects of this proviso is that it will exclude from the benefits of section 8 all schools provided by local authorities.

Method of Relief

Section 8 provides that the amount of rates chargeable in respect of any hereditament to which the section applies for the first year after the coming into force of the new valuation lists shall not exceed the total amount of rates (including any special rates) which was charged for the last year before the coming into force of the new lists.

So far as subsequent years are concerned, there must be calculated the amount of rates which would have been chargeable in the first year of the new lists but for the provisions of the section. If the amount actually charged by virtue of the section is less than it would otherwise have been, then the proportion of the reduction is to be calculated and the amount of rates chargeable in subsequent years is to be reduced by that proportion.

If the rate period forms part only of the first year of the new list, provision is made for the proportion to be calculated with reference to that period and to a period of comparable duration before the coming into force of the new list (*x*).

Such is the general nature of the concession granted by section 8, but rating authorities are empowered to reduce or withdraw the concession by giving not less than a three-year notice to the occupier of the hereditament in question. If such a notice is given, then after the expiry of the three-year period the concession ceases to apply, or is reduced as specified in the notice. Rating authorities also have a discretion to reduce or remit the amount or rates payable in respect of any hereditament to which section 8 applies for the first or any subsequent year of the new valuation lists even beyond the proportion which would otherwise be appropriate. This

(*w*) A "rate" is defined by s. 34 of the Local Loans Act, 1875, as "a rate the proceeds of which are applicable to public local purposes and leviable on the basis of an assessment in respect of property, and includes any sum which, though obtained in the first instance by a precept, certificate or other document requiring payment from some authority or officer, is or can ultimately be raised out of a rate . . ." The proviso to s. 8 (1) of the 1955 Act refers to an "authority," not merely to a local authority, so that the proviso would include, for example, the Receiver of Metropolitan Police, who is a precepting authority. Hereditaments occupied by the Receiver are, however, in general entitled to the exemption from rates enjoyed by the Crown.

(*x*) Provision is also made by the Fifth Schedule for cases in which owing to a change of circumstances there is an alteration in the rateable value of a hereditament either during the last year of the old list or during the first year of the new.

power will enable rating authorities to make concessions in favour of new hereditaments which come within the scope of section 8, but which for one reason or another were not within the section when the old valuation lists were in force, and to which the proportionate reduction cannot therefore apply (*y*).

(4) *Sewers : Drainage Authorities : Invalid Structures*

Sewers, whether above or below the ground, appear in the current valuation lists as rateable hereditaments. It is, however, now provided by section 9 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, that sewers (*z*) shall not be included in the first new valuation list to be prepared after the passing of the Act, nor in any subsequent list and that no sewer shall be liable to be rated or included in any rate on or after the date when the first new valuation list comes into force. The exemption will also extend to any manhole, ventilating shaft, pumping station, pump or other accessory belonging to any sewer (*a*). Sewage treatment works will, however, remain liable to be rated.

Also by virtue of section 9 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, there will be excluded from the first new valuation list to be prepared after the passing of the Act and from all subsequent lists: " (a) any land which is occupied by a river board or other drainage authority and forms part of a main river for the purposes of Part II of the Land Drainage Act, 1930, or of a watercourse maintained by the authority, or (b) any structure or appliance maintained by a river board or other drainage authority, being a structure or appliance for controlling or regulating the flow of water in, into or out of a watercourse which forms part of a main river for the purposes of the said Part II or is maintained by the authority " (*b*).

Such hereditaments will not be liable to be rated for any rate period beginning on or after the date when the first new valuation list comes into force. Any right of fishing or shooting which constitutes a separate hereditament will, although connected with

(*y*) No right of appeal against the exercise of these discretionary powers is expressly given by the Act. A proposal to alter the valuation list will be of no avail, since the list will not be affected by the exercise of these powers. It may be, however, that an appeal will lie to quarter sessions: see s. 4, Poor Relief Act, 1743.

(*z*) The definition of " sewer " contained in s. 343 of the Public Health Act, 1936, is adopted for rating areas outside London. For rating areas within the administrative county of London the definition of " sewer " contained in s. 81 of the Public Health (London) Act, 1936, is adopted.

(*a*) s. 9 (3).

(*b*) s. 9 (4). The terms " land," " main river," " drainage authority " and " watercourse " are defined by s. 81 of the Land Drainage Act, 1930.

or related to such exempted hereditaments, remain rateable as before (*c*).

There will also be exempt from rates when the new valuation lists come into force any structure belonging to the Minister of Health and supplied by the Minister or by his predecessor, the Minister of Pensions, for the accommodation of any invalid chair or vehicle; any structure belonging to a local health authority or voluntary organisation under section 28 of the National Health Service Act, 1946 (*d*), any structure belonging to a local authority within the meaning of section 29 of the National Assistance Act, 1948 (*e*), or any similar structure supplied for any of the above purposes by any other person (*f*).

(5) *Gas Boards*

There is nothing in the Gas Act, 1948, or in the Local Government Act, 1948, to exempt from liability to be rated hereditaments now occupied by Area Gas Boards. The Rating and Valuation (Miscellaneous Provisions) Act, 1955, however, provides a new rating scheme which will operate from the first rate period beginning after March 31, 1956 (*g*). This scheme does not consist of an exemption from rates coupled with provision for the making of a contribution in lieu of rates such as applies to British Railways and to the British Electricity Authority and its Area Boards. It provides instead that each Gas Board shall be rated in respect of a notional hereditament in each rating area in which it supplies or manufactures gas. Initially each Gas Board is given a basic total of rateable values and a standard number of therms by the Minister of Housing and Local Government and by the Minister of Fuel and Power respectively. Every year the basic total of rateable values will be adjusted by reference to the standard number of therms and the estimated total number of therms supplied by the Board to customers in their area in the last but one year (*h*) before the year in question (*i*).

The adjusted basic total of rateable values is then divided up between the rating areas within the Board's area by references to the number of therms supplied to consumers in each rating area and the number of therms manufactured in that rating area in the

(*c*) s. 9 (4).
(*d*) This section is concerned with the prevention of illness and the cure and after-care of persons suffering from illness or mental defectiveness.
(*e*) This section relates to welfare arrangements for blind, deaf and other handicapped persons.
(*f*) s. 9 (1) of the Act of 1955.
(*g*) See s. 6 and the Third Schedule.
(*h*) Called "the penultimate year."
(*i*) See note on p. 364.

penultimate year (*j*). The resultant figure becomes the rateable value of the hereditament notionally occupied by the Board in that rating area and the Board is assessed to rates accordingly and not by reference to the value of the hereditaments which it in fact occupies within the rating area. Excluded from this scheme, however, are premises occupied by Gas Boards and used as dwelling-houses or premises occupied by Gas Boards wholly or mainly for the purposes of an undertaking for the supply of water. Such premises will appear in the valuation lists as separate hereditaments and their rateable values will be determined in the usual way (*k*).

Provision is also made by the Fourth Schedule to the Act of 1955 for adjusting the amount of rates levied for rate periods between March 31, 1952, and April 1, 1956, by reference to similar considerations.

(B) Procedural Amendments

(1) *Preparation of New Valuation Lists*

The Local Government Act, 1948, made provision for the preparation and settling of new valuation lists (*l*). Initially the valuation officer was required to prepare a draft list which was to be open to public inspection and to objection by persons aggrieved. After receipt of any objections, the valuation officer was to revise the list making such alterations as he thought proper. Not later than the end of December preceding the date on which the new valuation list was to come into force, it was the valuation officer's duty to settle the list and transmit it to the rating authority. No

(*i*) The calculation to be made may be expressed by the following calculation:
Let B.T.R.V. = Basic total of rateable values.
S.N.T. = Standard number of therms.
T.S.A. = Estimated number of therms supplied in the penultimate year in the whole area of the Board.
A.B.T.R.V. = Adjusted basic total of rateable values.
Then:

$$\text{A.B.T.R.V.} = \frac{\text{B.T.R.V.}}{1} \times \left(\frac{\text{S.N.T.}}{1} + \frac{(\text{T.S.A.} - \text{S.N.T.})}{5} \right) \Big/ \text{S.N.T.}$$

(*j*) The calculation to be made may be expressed as follows:—
Let R.V. = Rateable value of the notional hereditament.
T.S. = Estimated number of therms supplied in the rating area in the penultimate year.
T.M. = Estimated number of therms manufactured in the rating area in the penultimate year.
T.M.A. = Estimated number of therms manufactured in the whole area of the Board in the penultimate year.
Then

$$\text{R.V.} = \frac{\text{A.B.T.R.V.}}{1} \times \frac{\left(\frac{\text{T.S.}}{1} + \frac{9\ \text{T.M.}}{10}\right)}{\left(\frac{\text{T.S.A.}}{1} + \frac{9\ \text{T.M.A.}}{10}\right)}$$

(*k*) Such premises are known as "excepted premises."
(*l*) See ss. 35–8 (now repealed).

new valuation lists have, however, been prepared in accordance with the above procedure, which has now been abolished by the Rating and Valuation (Miscellaneous Provisions) Act, 1955. In its place the Act of 1955 lays down a considerably simpler procedure, which provides that alterations of new valuation lists shall be made by way of proposal, as are alterations in current valuation lists, rather than by way of objection. It is hoped in this way to make the preparation of new lists administratively more convenient and also to reduce the public anxiety which would have been likely to result under the old procedure from the publication of new and greatly increased rateable values long before the new rate in the pound was known (*m*). Moreover, in order to reduce the interval between the completion of the new valuation lists and the making of the rate with reference to them, rating authorities are now empowered by section 4 of the Act of 1955 to make a rate with reference to a new list for the year or part of the year beginning with the day on which the new list is due to come into force, even although at the date of the making of the rate the list is not yet in force.

Under the new procedure (*n*) it is the duty of the valuation officer to prepare the new valuation list inserting therein such particulars as the Minister of Housing and Local Government may by order require (*o*). Not later than the end of December preceding the date on which the new list is to come into force, the valuation officer is required to sign the list and transmit it together with one copy to the rating authority for the rating area to which it relates (*p*). It thereupon becomes the duty of the rating authority immediately to take such steps as it considers most suitable for giving notice of the list and of the rights of persons to inspect the list and to make proposals for altering it (*q*).

If between the date of the transmission of the new list to the rating authority and the date of its coming into force (*r*) it appears to the valuation officer that there has occurred a " material change of circumstances " necessitating the alteration of the list, it is his duty to make the necessary alteration before the list comes into

(*m*) Post-war inflation is bound to produce greatly increased rateable values, which should in their turn produce reduced rates per pound.

(*n*) See ss. 1 and 2 of the Act of 1955.

(*o*) The Minister may prescribe regulations both in relation to the whole rating area and in respect of any parish or area which is liable to be charged separately in respect of any expenses.

(*p*) The Minister has power to extend the period beyond the end of December. The first new lists are due to be transmitted before the end of December, 1955.

(*q*) It is perhaps surprising that no minimum standards of publication are prescribed, *cf.* s. 35 (2) of the Act of 1948 (now repealed).

(*r*) *i.e.*, normally between the end of the December of one year and the beginning of the April of the next year.

force. The "material change of circumstances" must have occurred after the date on which the valuation officer prepared so much of the list as relates to the alteration in question. The valuation officer is thus not given power of his own initiative to have "second thoughts" about any entries he has made in the list.

A "material change of circumstances" means the coming into occupation of a newly erected or newly constructed hereditament or of a hereditament which has been out of occupation on account of structural alterations, or the occurrence of any of the events specified in paragraphs (b) to (g) of subsection (2) of section 42 of the Local Government Act, 1948 (*s*). This subsection lists those alterations in a valuation list which, contrary to the general rule, have effect only from the date on which the event which gave rise to the alteration occurred and not from the beginning of the rate period in which the proposal for the alteration was made (*t*).

(2) *Alterations of New and Current Valuation Lists*

Although the current valuation lists were prepared in accordance with the provisions of the Valuation (Metropolis) Act, 1869, or of the Rating and Valuation Act, 1925, their amendment and alteration are now governed by the provisions of the Local Government Act, 1948, as amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The amendment and alteration of new valuation lists not in force are now also governed by the same provisions, so that the same procedure by way of proposal applies whether an alteration is sought in a valuation list in force or yet to come into force.

Section 40 (1) of the Local Government Act, 1948, which confers a right to make a proposal for the alteration of a valuation list upon "any person who is aggrieved" remains unaltered. Since a rating authority nearly always occupies hereditaments within its own rating area, it enjoys all the rights of a person aggrieved. Moreover, it has been held in *Grainger* v. *Liverpool Corporation* [1954] 1 Q.B. 351 that a rating authority as the authority interested in the fair and proper rating of its area is a person aggrieved by any inequalities or under-assessments in the valuation list and is under a duty to make a proposal for their amendment. It is not, however, entirely clear whether section 40 entitles a person aggrieved to make a proposal for the inclusion in the valuation list of a hereditament which is wholly excluded from it. It is, however, now expressly provided that if it appears to a rating authority that

(*s*) This subsection has been slightly amended by the Act of 1955.
(*t*) See s. 42 (1) of the Act of 1948.

a hereditament within its rating area which is not included in the valuation list ought to be included in it, then the rating authority may make a proposal for its inclusion within twenty-eight days of being given written notice by the valuation officer that he does not intend to make a proposal for its inclusion in the list (*u*).

In one minor respect the right to make a proposal has been temporarily restricted by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which provides (*v*) that no proposal for the alteration of a valuation list in force at the date of the passing of the Act (*viz.*, July 27, 1955) shall be of any effect if served after the date of the passing of the Act unless made either by the valuation officer or by the owner or occupier of the hereditament to which the proposal relates. This proposal appears to be directed against rating authorities who, it was feared, might after receipt of the new valuation lists in December immediately make proposals to raise the assessments in the old valuation lists still in force to the levels of the assessments in the new lists (*w*). The provision has, however, also had the effect of removing the right of private occupiers to secure the alteration of assessments of other hereditaments in the rating area.

(3) *Proceedings on Proposals*

The First Schedule to the Act of 1955 contains an elaborate amendment of section 41 of the Act of 1948 which governs proceedings on proposals. The general effect of this amendment is to enable the valuation officer to delay the reference of appeals to the local valuation court for as much as six months (*x*).

Section 41 as amended now provides that it is the duty of the valuation officer within twenty-eight days after the date on which a proposal is served on him, or where the proposal is his own, within seven days of making it, to transmit a copy of the proposal to both the occupier of the hereditament to which the proposal relates and to the rating authority for the area in which the hereditament is situated. The valuation officer need not, however, serve an occupier with a copy of the occupier's own proposal or a rating authority with a copy of its own proposal.

The copy of the proposal must be accompanied by a written

(*u*) s. 40 (2A) of the Act of 1948 as amended by the Act of 1955. This subsection is expressly without prejudice to any rights which a rating authority may enjoy as a person aggrieved.

(*v*) s. 2 (2).

(*w*) Valuation officers could scarcely gainsay such proposals since they would be based on their own assessments.

(*x*) Presumably it is anticipated that as soon as the new valuation lists are given publicity, valuation officers will be burdened by a number of proposals with which it will be impossible to deal in a short space of time.

statement of the persons entitled to object to the proposal and of the time within which they must do so. Those entitled to object are the owner (*y*) or the occupier of the whole or any part of the hereditament to which the proposal relates, or the rating authority (*z*). Objection is made by written notice served on the valuation officer within twenty-eight days from the date on which the copy of the proposal was served on the objector (*a*).

If no notice of objection is served within twenty-eight days and either the proposal was made by the valuation officer himself, or he is satisfied that it is well founded, then the valuation officer's duty is to alter the valuation list so as to give effect to the proposal (*b*).

If, however, any notice of objection is served on the valuation officer, his first duty is to serve a copy of the notice upon the maker of the proposal (*c*). If as a result of discussion and consideration the notice or notices of objection are subsequently unconditionally withdrawn, then if either the proposal was made by the valuation officer himself or he is satisfied that it was well founded, it again becomes his duty to alter the list so as to give effect to the proposal. If notices of objection are given and not unconditionally withdrawn, but the persons whose agreement is necessary all agree on the alteration that ought to be made to the valuation list, then the valuation officer must make the agreed alteration to the list. Such an agreement must, however, be reached before the difference raised by the proposal and notice of objection is determined by a local valuation court or by a reference to arbitration (*d*). The agreed alteration need not necessarily be that contained in the proposal (*e*). The persons whose agreement is necessary before an agreed alteration can be made are:

"(a) the valuation officer;

(b) the person who made the proposal, where the proposal was not made by the valuation officer;

(c) any person who has served, and has not unconditionally withdrawn, a notice of objection to the proposal;

(*y*) For the definition of "owner" see s. 144 (1) of the Act of 1948. The owner will not receive any direct notice of the proposal, since the valuation officer is not bound to serve him with a copy.

(*z*) All or any of these can object.

(*a*) s. 41 (3) as amended.

(*b*) s. 41 (4) as amended.

(*c*) He cannot, of course, serve a copy on himself if he is the maker of the proposal.

(*d*) s. 41 (5) as amended.

(*e*) It must, however, be some modification of the original alteration specified in the proposal. The agreed alteration cannot, for instance, relate to an entirely different hereditament.

(d) the occupier of the hereditament to which the proposal relates, if he is not included by virtue of either of the two last preceding paragraphs; and

(e) the rating authority (if not included by virtue of any of the preceding paragraphs), unless they have notified the valuation officer that they do not desire to be included by virtue of this paragraph, either generally or as respects a class of hereditaments which includes the hereditament to which the proposal relates " (*f*).

It should be noted that before an agreed alteration can be made the occupier's consent is necessary although he may have given no notice of objection. The same is also true of the rating authority's consent, unless the authority does not wish to be included.

If the matter raised by the proposal is not disposed of in one of the two ways above described, and always provided that the proposal is not withdrawn, then the matter will be determined by appeal to the local valuation court or by reference to arbitration.

If although no notice of objection to the proposal has been given, the valuation officer is not prepared to give effect to the proposal because he is not satisfied that it is well founded, then at any time within five months of the service of the proposal upon him, the valuation officer may give written notice of his objection to the proposal to the maker thereof. Such notice of objection must also inform the maker of the proposal that unless he withdraws his proposal within fourteen days, he will be treated as intending to appeal against the valuation officer's objection. If at the expiry of the fourteen days the proposal has not been withdrawn, then the valuation officer must within the next fourteen days transmit a copy of the proposal and a copy of his own notice of objection to the clerk to the local valuation panel from which the local valuation court which is to hear the appeal falls to be constituted (*g*).

Should the valuation officer fail to give notice of his objection within six months of the date of service of the proposal on him and if no other notices of objection have been served, or if every such notice has been unconditionally withdrawn, then at the end of that period the valuation officer is deemed to be satisfied that the proposal is well founded and accordingly he comes under a duty to give effect to it (*h*).

If notices of objection have been served by other persons and not unconditionally withdrawn, then the valuation officer must,

(*f*) s. 41 (8) as amended.
(*g*) s. 41 (6) (b) and (c) as amended.
(*h*) s. 41 (6) (d) as amended.

before the expiry of six months from the date of service of the proposal on him, or, if the proposal is his own, of the date when it was made, transmit a copy of the proposal and of every notice of objection to the clerk of the appropriate local valuation panel (*i*). He may at any time within the first five months of the period of six months give notice to the proposer of his own objection, but if he does this he must also notify the maker of the proposal that if he does not withdraw his proposal within fourteen days he will be treated as wishing to appeal. If the proposal is not withdrawn, then the valuation officer must transmit copies of the proposal and of the notices of objection (including his own) to the clerk to the local valuation panel within the next fourteen days, even although the period of six months has not by then expired (*j*).

Procedure before the local valuation courts remains the same. A local valuation panel may now, however, have more than two deputy chairmen (*k*). With the consent of all parties to an appeal, a local valuation court may now consist of two members only, instead of the normal three (*l*).

(4) *Recovery of Rates*

Where a proposal is made to alter the value of a hereditament in a new valuation list (*m*), then, although generally the alteration, if made, will relate back and any sum overpaid will become repayable to the ratepayer, it could well constitute a hardship if the ratepayer were compelled to pay rates in accordance with an excessive and erroneous assessment contained in the new list until such time as he could secure its alteration. It is now, therefore, provided (*n*) that where the value ascribed to a hereditament in a new valuation list exceeds the value last ascribed to it in the preceding list and the hereditament has not been substantially altered since its former value was determined, then if a proposal to reduce the value in the new list is served on the valuation officer before the end of the first year in which the new list is in force (*o*), the amount of rates recoverable in respect of the hereditament for that first year or for any subsequent year shall not exceed the total amount of rates which were levied on the hereditament for the last year before the new list came into force until the proposal has been

(*i*) s. 41 (6) (a) as amended.
(*j*) s. 41 (6) (c) and (d) as amended.
(*k*) s. 46 (1) (b) as amended.
(*l*) Proviso to s. 44 (3) as amended.
(*m*) *i.e.*, one which comes into force after the passing of the Act of 1955 (July 27, 1955): s. 116 (1) of that Act.
(*n*) By s. 1 (7) of the Act of 1955.
(*o*) This year will run from April 1 of one year to March 31 of the next year.

"settled." A proposal is "settled" as soon as one of the following events occur:

(1) the list is altered so as to give effect to the proposal; or

(2) the list is altered so as to give effect to an agreement made in pursuance of the proposal; or

(3) proceedings on an appeal against, or a reference to arbitration relating to, an objection to the proposal (including any proceedings in consequence of such an appeal or reference to arbitration) are fully determined;

(4) the proposal is withdrawn.

Section 12 of the Act of 1955 contains provisions to protect the tenants of dwelling-houses to which the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, applies. As a result of the coming into force of new valuation lists, the landlord of such a dwelling-house may become entitled to serve a notice of increase of rent upon the tenant by virtue of section 2 of the Act of 1920 (*p*). If he does so within the first year of the new list coming into force, and within the same year a proposal is made to reduce the rateable value of the dwelling-house so as to make no additional rates payable until the proposal is settled, then the tenant is given an option. He may serve on the landlord at any time before the proposal is settled a "suspense notice." If he does so, then until such time as the first demand for rates after the settlement of the proposal is made, he does not have to pay the increase of rent. If when the proposal is settled no reduction, or only a partial reduction, is made in the rateable value of the dwelling-house, then the landlord may by serving a notice become entitled to recover the unpaid balance of rent which would have been payable had the suspense notice not been served, and had the notice of increase been based on the rateable value as finally settled.

Alternatively, the tenant may elect not to serve a suspense notice and may continue to pay rent in accordance with the notice of increase. If a proposal made within the first year of the coming into force of the new list results in a reduction of the rateable value of the dwelling-house, then the tenant is entitled to recover the whole of the increased rent paid by him or such part of it as is appropriate having regard to the reduction made.

If the tenant wishes to serve a suspense notice, he should do

(*p*) Any notice of increase served within the first year of the new list coming into force will be of no effect unless accompanied by statements containing such information as to the tenant's rights as may be prescribed by regulations made by the Minister of Housing and Local Government under the Rent and Mortgage Interests Restrictions (Amendment) Act, 1933: s. 12 (2) and 12 (10) of the Act of 1955.

so as soon as he receives notice of the proposal which entitles him to serve it, because section 12 gives him no right to recover any rent paid before a suspense notice is served (*q*). If he fails to serve a suspense notice promptly, he will be better advised not to serve one at all.

(5) *Evidence in Valuation Proceedings*

By virtue of section 3 of the Act of 1955 returns made to the valuation officer under section 58 of the Local Government Act, 1948, (*r*) are now admissible as evidence of the facts stated in the return in any valuation proceedings (*s*), other than "proceedings relating to the ascertainment of the net annual value of a hereditament by reference to the accounts, receipts or profits of an undertaking" (*t*), although according to the normal rules of evidence they would be inadmissible as "*res inter alios acta*." Moreover, any document purporting to be such a return is to be presumed unless the contrary is shown to be such a return, to have been made by the person by whom it purports to have been made, and in the capacity in which it purports to have been made by him (*u*).

Since much turns in valuation proceedings upon the consideration of values comparable to that of the hereditament to be assessed, this relaxation of the rules of evidence is of considerable importance (*v*). The valuation officer is normally in possession of the returns which relate to his rating area, but no return may be used as evidence for or on behalf of the valuation officer unless he has given fourteen days' notice of the return and of the hereditament to which it relates to other parties to the proceedings (*w*).

If a party to valuation proceedings receives a notice of the valuation officer's intention to use any return as evidence in the proceedings, he may in turn give the valuation officer notice of one or more hereditaments comparable in character or otherwise relevant to his case and may by the notice require the valuation officer to allow him to inspect and take extracts from the returns relating to those hereditaments and to produce such of those

(*q*) s. 12 (4).

(*r*) Or under its statutory predecessors, ss. 40, 41 of the Rating and Valuation Act, 1926, and ss. 55, 56 and 57 of the Valuation (Metropolis) Act, 1869.

(*s*) "Valuation proceedings" are "any proceedings on or in consequence of an appeal to a local valuation court and any proceedings on or in consequence of a reference to arbitration under s. 50 of the Act of 1948": s. 3 (1) of the Act of 1955.

(*t*) s. 3 (4). This is a reference to "the profits basis" of assessment.

(*u*) As occupier, owner, lessee or in any other capacity: *ibid.*, s. 3 (2).

(*v*) It should be noted, however, that s. 3 deals only with the admissibility and proof of returns, but not with the weight to be attached to them.

(*w*) *i.e.*, to the maker of the proposal and to every other person who has served and not unconditionally withdrawn a notice of objection to the proposal.

returns as he may require at the hearing. The number of hereditaments specified in such counter-notice may not, however, exceed the number of hereditaments specified in the valuation officer's original notice (*x*).

If the valuation officer fails or refuses to comply with such a notice, then the person who gave the notice may apply to the court or tribunal before which the proceedings are to be brought and the court or tribunal or arbitrator may, if satisfied that it is reasonable to do so, direct the valuation officer to comply with the notice in whole or in part (*y*).

A party to valuation proceedings has, however, no right to inspect or call for the production of returns relating to other hereditaments unless the valuation officer first gives notice that he intends to use returns as evidence in the proceedings (*z*). As a result of the above provisions, a return may now be used in evidence in public proceedings which are not concerned with hereditament to which the return relates and to which the maker of the return is not a party. This may be done without the consent of the maker of the return and without any notice to him.

(6) *Rating of Owners*

Many owners (*a*) of hereditaments are liable to be rated in lieu of the occupiers of the hereditaments, because the hereditaments in question are within the terms of resolutions passed by rating authorities under section 11 of the Rating and Valuation Act, 1925. When new valuation lists come into force containing rateable values calculated by reference to post-war prices and values, many such hereditaments will cease to be within the terms of such resolutions because their new rateable values will exceed the maximum prescribed by the resolutions or by statute.

To meet this difficulty it is provided by section 4 (5) of the Act of 1925 that a rating authority may by resolution direct that hereditaments, which were included in the class defined by the resolution under section 11 of the Act of 1925 immediately before the new valuation list came into force, shall remain within the terms of that resolution notwithstanding that their new rateable values would otherwise exclude them. Such a resolution to preserve the rating of owners must, however, specify a maximum new rateable value for hereditaments whose owners are to remain rateable. If the new rateable value of a hereditament exceeds

(*x*) s. 3 (5).
(*y*) An appeal lies against the refusal of a local valuation court to direct compliance with such a counter-notice: s. 3 (8).
(*z*) This seems to be an unjustifiable disability.
(*a*) For definition of "owner," see s. 11 (11) of the Act of 1925.

this maximum, then the owner will cease to be and the occupier will become rateable in respect of it (*c*).

(7) *Other Matters*

Finally a number of detailed amendments may be noted shortly.

Provision is made by section 3 of the Rating and Valuation Act, 1925, to enable rural rating authorities to make a special rate for such parts of their rating area as are liable to bear it. No such special rate will, however, be leviable for any rate period after the coming into force of the first new valuation list after the passing of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Instead any expenses which would formerly have been chargeable as a special rate will be levied in the appropriate parts of the rating area as an additional item of the general rate (*d*).

It is now provided by section 4 (2) of the Act of 1955 that whilst a resolution making the rate must specify the amount per pound of rateable value at which the rate is to be levied, it need not be made with reference to any rate book or individual hereditaments, nor need it take account of any special rating privileges or of any additional item leviable in the whole or part of the rating area (*e*).

Section 10 of the Act empowers police authorities to make contribution in aid of rates in respect of hereditaments occupied for the purposes of the police force (*f*).

Section 11 empowers statutory water undertakers who levy rates by reference to values shown in valuation lists to make a water rate for two special periods in the year which includes the coming into force of the new valuation lists, and provides that for the first of such special periods the old valuation lists may be treated as continuing in force although in fact the first period began on or after the date when the new valuation lists came into force.

Section 13 of the Act provides that the Minister of Housing and Local Government may make an order regulating the fees, charges and expenses in respect of, and incidental to, the levying of distress for rates. When such an order comes into force, the Distress (Costs) Act, 1817, as extended by the Distress (Costs) Act, 1827, will cease to apply to distress for rates.

(*c*) A resolution preserving the rating owners ceases to have effect when the old resolution is rescinded or when the first new valuation list to come into force after the passing of the Act of 1955 is superseded by a subsequent list, whichever is the sooner: proviso to s. 4 (5).

(*d*) s. 4 (1) of the Act of 1955. As from the coming into force of the first new valuation list ss. 3 and 4 (3) of the Act of 1925 together with part of s. 2 (5) will stand repealed: s. 15 and Part II of the Eighth Schedule to the Act of 1955.

(*e*) This provision is deemed always to have had effect: s. 4 (3).

(*f*) Hereditaments occupied for police purposes usually enjoy the Crown's exemption from liability to be rated.

MISTAKE AND SALES OF LAND AT EXISTING USE VALUE

By R. H. Maudsley, b.c.l., m.a., and R. L. A. Goff, m.a., Barristers-at-Law

The town and country planning legislation has provided a further illustration of the importance and difficulty of keeping up to date with contemporary developments. After the Town and Country Planning Act, 1947, came into operation, the problem was to persuade purchasers to pay no more for land than the existing use value if the vendor retained his "Part VI claim." The problem since the appearance of the White Paper on November 18, 1952 (*a*), laying down the policy on which the Town and Country Planning Act, 1954, was based, is that of ensuring that vendors charge the full price for land, including any value that may be attributable to the possibility of development, for owners of land no longer have to pay a development charge (*b*); the price should also include a sum representing any right of the purchaser to a claim under Parts II–V of the Act, whether in respect of the "unexpended balance of established development value," which is merged again with the land and adds to its value (*c*), or in respect of a claim under Part IV, which may be made where no such unexpended balance exists (*d*). As the purchaser receives this additional value he should be made to pay for it. This paper proposes to deal with the position of a vendor who has sold land after November 18, 1952, to a purchaser at existing use value (*e*), and to consider whether there is any action which the vendor may take to rectify his error in selling below the full value. At any stage at which the vendor is referred to, a reference is intended to the vendor in this hypothetical case.

It is clear that no quasi-contractual action will lie merely in respect of the loss of the benefit by the vendor and its acquisition by the purchaser. No system of quasi-contractual relief can contemplate giving an action to a plaintiff to permit him to recover

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(*a*) Cmd. 8699.
(*b*) Town and Country Planning Act, 1953, s. 1.
(*c*) Town and Country Planning Act, 1954, s. 17.
(*d*) 1954 Act, s. 38.
(*e*) 1954 Act, s. 5 (3) (b).

that which a statute has expressly given to the defendant (*f*). This proposition is sufficiently self-evident to need no further argument.

It is material also to appreciate that a vendor who sells land in this way with knowledge of his legal rights has only himself to blame. It is elementary that generally speaking voluntary payments cannot be recovered (*g*). The plaintiff must allege and prove facts which will sufficiently justify recovery. It is no part of the object of this paper to examine the scope and theoretical basis of non-contractual, non-tortious actions for the recovery of money; these matters are unsettled and the subject of controversy. Whatever theory may be the correct one, it is clear that payments are only recoverable where there is some good reason, based on principle and authority, to justify repayment (*h*); one of the most common reasons, and one indisputably accepted, is that the payment was made under mistake. In the present case, the plaintiff will have no hope of obtaining relief unless he can show that the failure to charge a price which was adequate to include the development value of the land was due to his mistake.

If that is the case, the next question to consider is whether the mistake was one of law or one of fact. This is a matter of importance because the general rule is that an action lies to recover money paid or benefits conferred under mistake of fact, but not to recover money paid or benefits conferred under mistake of law (*i*). This obstacle to a successful action for the recovery of money in respect of the benefit mistakenly conferred in addition to the existing use value appears to be insuperable (*k*). But the vendor here is not dependent solely upon an action for the recovery of money; he may apply to the court for equitable relief. The principles on which courts of equity act in giving relief in certain cases of mistake, even mistake of law, are discussed below (*l*). And where the vendor does apply for relief in equity, he will have much more chance of success if he can establish that his mistake

(*f*) The statute may, of course, give, expressly or by implication, a right of action for compensation. There is nothing to suggest that any such right is given in this case.

(*g*) *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234, 248, *per* Bowen L.J.

(*h*) *Green* v. *Portsmouth Stadium* [1953] 2 Q.B. 190.

(*i*) *Bilbie* v. *Lumley* (1802) 2 East 469; *Brisbane* v. *Dacres* (1813) 5 Taunt. 143; *Skyring* v. *Greenwood* (1825) 4 B. & C. 281; *Holt* v. *Markham* [1923] 1 K.B. 504; *Ord* v. *Ord* [1923] 2 K.B. 432; *Aktieselskabet Dampskibs Steinstad* v. *W. Pearson & Co.* (1927) 43 T.L.R. 531; *National Pari-Mutuel Association* v. *R.* (1930) 47 T.L.R. 110.

(*k*) See note (*i*). *Rogers* v. *Ingham* (1876) 3 Ch.D. 351, 355–6.

(*l*) *Infra*, p. 380.

was one of fact and not one of law (*m*). It is difficult to lay down a formula to decide this important question (*n*), but, while in a case like the present, where the issue concerns the effect of statutory provisions dealing with the development value of land, the question would appear to be one of law, there are two ways in which this case differs from an ordinary case of mistake of law. In the first place, the mistake, in the case of a sale between November 18, 1952, and January 1, 1955, concerns the legal position as it is going to be, and of which notice of the Government's intention has been given in the White Paper. The Act of 1954 is to that extent retrospective. It is a nice question whether the vendor's mistake would be regarded as a mistake as to the law as it was later retrospectively enacted, or whether it would be a mistake as to the fact of publication of, or as to the contents of, the White Paper. It is submitted that the mistake should be regarded as one of law: it would be so regarded under Keener's test (*o*); and an enactment is no less "law" because it is enacted retrospectively. In the second place it is possible that the vendor may be able to treat the mistake as one of fact by invoking the rule that a mistake as to private rights is a mistake of fact and not one of law (*p*). Such an argument would be based on a famous dictum of Lord Westbury in *Cooper* v. *Phibbs* (*q*), where he said:

> "It is said, '*Ignorantia juris haud excusat*'; but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

The mistake in that case concerned the construction of a family document conferring rights of ownership and a private Act of Parliament. This rule was, however, applied by Bucknill L.J. in

(*m*) *Cochrane* v. *Willis* (1865) L.R. 1 Ch.App. 58; *Scott* v. *Coulson* [1903] 2 Ch. 249.

(*n*) Keener, *Quasi-Contracts*, pp. 96–112.

(*o*) Keener, *op. cit.*, 96. "Therefore if in a given case a lawyer or judge can, solely because of his knowledge of law, give an opinion as to the result that should be reached, the case necessarily involves a question of law and not of fact."

(*p*) Even so, he may not be able to bring an action for the recovery of money: *per* Wynn-Parry J. in *Re Diplock* [1947] Ch. 716, 729.

(*q*) (1867) L.R. 2 H.L. 149, 170.

Solle v. *Butcher* (*r*), to a mistaken interpretation of general legislation (*s*) which contained provisions affecting private property. An application of the rule in such a case is more nearly an authority for its application to this hypothetical case. It was relied on, however, by only one of three judges; and its application to cases of that type would involve the assertion that all questions concerning ownership were questions of fact. The truth of the matter, it is submitted, is that questions of legal title are questions of law, and that Lord Westbury's true meaning is that the jurisdiction of a court of equity to grant relief in cases of mistake exists in certain cases of mistake as to title, but not in all cases of mistake of law. Mistake as to legal title is therefore treated in this paper as a question of law, and is dealt with below as such. It is submitted therefore that the vendor's error is one of law and not one of fact.

The case of *Solle* v. *Butcher* (*t*), however, may well be distinguished from the present hypothetical case. The type of mistake that appears in the two cases is different. In *Solle* v. *Butcher*, the parties knew that the law in question existed and mistakenly applied it; in the hypothetical case the parties did not know that the law in question existed. *Solle* v. *Butcher* is properly a case of *mistake* of law, and the present case is one of *ignorance* of the law. This is a distinction that has not been taken in England; in fact the maxim on which the refusal to give relief is based assumes that ignorance and mistake are the same thing (*u*). It has more than once been pointed out (*a*) that the maxim was not originally intended to be relevant to cases of relief in civil actions for mistake of law, but rather that it emphasised the inapplicability of the defence of ignorance in criminal prosecutions. In such circumstances, it is immaterial whether the accused broke a rule of law because he did not know that such a rule existed or because he did not think that a particular rule of law covered what he proposed to do. But in civil actions the considerations relevant to questions of mistake of law are not necessarily the same as those relevant to ignorance of law (*b*). The vendor may

(*r*) [1950] 1 K.B. 671, 685. (*s*) The Rent Restriction Acts, 1920 to 1949.
(*t*) [1950] 1 K.B. 671.
(*u*) "*Ignorantia juris haud* (or *neminem*) *excusat.*" *Lowry* v. *Bourdieu* (1780) 1 and 2 Douglas 468; *Bilbie* v. *Lumley* (1802) 2 East 469.
(*a*) *Lansdown* v. *Lansdown* (1730) Mos. 364, 365, by King L.C.; *Brisbane* v. *Dacres* (1813) 5 Taunt. 143, 158–9, by Chambre J., dissenting; 7 *Columbia Law Review* 476; Keener, *Quasi-Contracts*, 87; Woodward, *Law of Quasi-Contracts*, 57–59.
(*b*) The distinction is made in two American jurisdictions (South Carolina and Georgia) where, however, recovery is allowed for a payment made under mistake of law, but not for one made in ignorance of law: Woodward, *op. cit.*, 62, 63; Thurston, *Cases in Restitution*, 606.

wish to make the distinction and rely on it in his own favour. He may argue that cases of mistake of law are more properly treated as cases of doubt than cases of mistake; the law is known to be uncertain, and a person who is using it must make inquiries, take his decision and stand by it. The same question arises where a person is in doubt as to the facts; to be uncertain and to choose wrong is not the same thing as to be mistaken (*c*). Every compromise involves at least one party who gives up some legal rights because he was in doubt; but the whole purpose of a compromise is to settle disputed claims, and the settlement cannot be reopened when the law has been discovered (*d*). Thus, the vendor may argue, cases of mistake of law should be treated like cases of doubtful facts; cases of ignorance of law on the other hand do not contain this element of doubt, and recovery should therefore be more readily allowed (*e*).

Assuming that the vendor fails on all these points, that the mistake is held to be one of law, and that no distinction is made in his favour between mistake and ignorance of law, there is a further line of argument that he may pursue. He may establish that, even so, the court may permit him to rescind a conveyance that has been made, or, if the conveyance has not yet been executed, relieve him from further performance.

There is no doubt that a jurisdiction exists in equity to set aside contracts and conveyances entered into or effected as a result of a mistake of law (*f*). The question is whether it would be exercised in the vendor's favour in this case. It is always difficult to forecast the result of the exercise of an equitable discretion; and, whether the vendor would succeed in such circumstances or not, there are arguments that can be put forward with some force on his behalf.

In an application for relief in equity the distinction between mistakes of fact and law is drawn less strictly than in cases of recovery of money (*g*). There are, however, certain cases in which relief will not be given, and these cases have given support to the view that relief will never be given in cases of mistake of

(*c*) But if he discovers the facts and negligently forgets them, he is treated as if he never knew them: *Kelly* v. *Solari* (1841) 9 M. & W. 54.

(*d*) *Stapylton* v. *Stapylton* (1739) 1 Atk. 2, 10; *Gibbons* v. *Caunt* (1799) 4 Ves. 840, 849; *Naylor* v. *Winch* (1824) 1 S. & S. 555; *Stewart* v. *Stewart* (1839) 6 Cl. & F. 911; *Rogers* v. *Ingham* (1876) 3 Ch.D. 351; *Callisher* v. *Bischoffsheim* (1879) L.R. 5 Q.B. 449.

(*e*) *Stanley* v. *Nuneaton Corporation* (1912) 107 L.T. 760.

(*f*) Kerr, *Mistake and Fraud*, 7th ed., 1952, Chap. III.

(*g*) *Stone* v. *Godfrey* (1854) 5 De G.M. & G. 76, 90; *Rogers* v. *Ingham* (1876) 3 Ch.D. 351, 357; *Re Saxon Life Assurance Co., Anchor Case* (1862) 2 J. & H. 408; *Allcard* v. *Walker* [1896] 2 Ch. 369, 381.

law. The true jurisdiction can, however, only be seen when these cases are put on one side and excluded from consideration. Relief will not usually be granted:—

(a) In cases of compromise—This point has already been raised. Where parties are in doubt as to the law or as to the facts, one of them must be wrong, and all compromises would be rendered ineffective if the party who turned out to be wrong could rely on his mistake (*d*).

(b) Where the question at issue is a family arrangement—The courts do not encourage families to litigate their differences (*h*).

(c) Where it is not possible to restore the *status quo* (*i*).

(d) Where the act of the plaintiff was not determined by his mistake (*k*).

The vendor's claim to relief will now be examined. It will be assumed that the circumstances do not bring the case within one of these categories; that the purchaser was not guilty of any misrepresentation or failure to disclose information (*l*). Nor will attention be focussed on different categories of cases in which relief has been given by reopening accounts after they had been settled through a mistake of law (*m*); or by upholding wills, dispositions or contracts which had been cancelled in later documents which were themselves void (*n*). The present inquiry is concerned with the authorities which show that relief may be given where a person has incurred obligations or surrendered or transferred property as a result of a misapprehension of the legal position (*o*).

This matter must be considered in three alternative situations:

1. *Where the vendor only was mistaken, and the purchaser did not know of the vendor's mistake.*

This is the ordinary case of a contract entered into under a unilateral mistake. The general rule is that no relief can be

(*h*) *Stockley* v. *Stockley* (1812) 1 Ves. & B. 23; *Stewart* v. *Stewart* (1839) 6 Cl. & F. 911; *Clifton* v. *Cockburn* (1834) 3 My. & K. 76.

(*i*) *Skyring* v. *Greenwood* (1825) 4 B. & C. 281; *Earl Beauchamp* v. *Winn* (1873) L.R. 6 H.L. 223, 232; *Broughton* v. *Hutt* (1858) 3 De G. & J. 501, 505.

(*k*) *Stone* v. *Godfrey* (1854) 5 De G.M. & G. 76.

(*l*) *Cocking* v. *Pratt* (1749) 1 Ves.Sen. 400; *Broughton* v. *Hutt* (1858) 3 De G. & J. 501; *Gordon* v. *Gordon* (1821) 3 Swanst. 400; *Pusey* v. *Desbouvrie* (1734) 3 P.Wms. 316.

(*m*) *Thomas* v. *Hawkes* (1841) 8 M. & W. 140; *Wilson* v. *Wilson* (1854) 14 C.B. 616; *Livesey* v. *Livesey* (1827) 3 Russ. 287; *Daniell* v. *Sinclair* (1881) 6 App.Cas. 181.

(*n*) *Onions* v. *Tyrer* (1716) 1 P.Wms. 343; *Perrott* v. *Perrott* (1811) 14 East 423; *Re Saxon Life Assurance Co., Anchor Case* (1862) 2 J. & H. 408.

(*o*) Kerr, *Fraud and Mistake*, 7th ed., Chap. III.

obtained (*p*). If, however, the conveyance has not yet been executed, specific performance against the vendor may be refused on any of the accepted grounds (*q*), the most material of which will be that a decree would cause undue hardship on the defendant (*r*), or that the price is inadequate (*s*). And it appears that specific performance may be refused whether the mistake is one of fact, or one of the legal effect of a document (*t*) (other than that of the contract itself).

Unilateral mistake is usually insufficient to justify the rescission of a lease or conveyance. But there is a line of cases in which the plaintiff, who has applied for rectification of a lease or conveyance, has failed on the ground that he was unable to prove that the mistake was mutual, but the court has compelled the defendant to submit either to rectification according to the plaintiff's request or to rescission of the transaction (*u*). The defendant has the choice. It is not clear whether this course will be followed where the defendant is ignorant of the plaintiff's mistake; it has indeed been said that there would be no jurisdiction to grant relief in the absence of fraud (*a*). The cases in which such relief has been given have been cases of mistake of fact (*u*).

2. *Where the vendor only was mistaken, and the purchaser knew of his mistake.*

Knowledge of the vendor's mistake will usually make no difference. Apart from cases of fiduciary relationship there is usually no duty to correct the other party's mistakes or errors of judgment. And where the mistake is one of law, it would appear *a fortiori* to be the responsibility of each party to discover the true position for himself. It may however influence the court in the defendant's favour in considering the exercise of its discretion to issue a decree of specific performance. It may also influence the court in deciding whether to give relief to the plaintiff by compelling the defendant to submit to either rescission or

(*p*) *Tamplin* v. *James* (1880) 15 Ch.D. 215; *Van Praagh* v. *Everidge* [1902] 2 Ch. 266; *Powell* v. *Smith* (1872) L.R. 14 Eq. 85; *Hart* v. *Hart* (1881) 18 Ch.D. 670.

(*q*) *Stapylton* v. *Scott* (1807) 13 Ves. 425; *Webster* v. *Cecil* (1861) 30 Beav. 62; *Wycombe Ry.* v. *Donnington Hospital* (1866) L.R. 1 Ch. 268; Fry, *Specific Performance*, 6th ed., Part III.

(*r*) *Malins* v. *Freeman* (1837) 2 Keen 25; *Tamplin* v. *James*, *supra*, *per* James L.J., at p. 221; *Stapylton* v. *Scott*, *supra*; *Howell* v. *George* (1815) 1 Madd. 1; *Hood* v. *Oglander* (1865) 34 Beav. 513.

(*s*) *Mortlock* v. *Buller* (1804) 10 Ves. 292; *Griffiths* v. *Jones* (1873) L.R. 15 Eq. 279.

(*t*) *Hood* v. *Oglander*, *supra*.

(*u*) *Garrard* v. *Frankel* (1862) 30 Beav. 445; *Harris* v. *Pepperell* (1867) L.R. 5 Eq. 1; *Paget* v. *Marshall* (1884) 28 Ch.D. 255.

(*a*) *May* v. *Platt* [1900] 1 Ch. 616.

rectification; indeed knowledge of the other party's mistake may amount to fraud in such a case. Where the mistake is not one of fact or of law but a mistake as to the offer, and the mistake is known to the other party, the contract may be void at common law (*b*) or liable to be set aside in equity (*c*).

3. *Where the purchaser shared the vendor's mistake.*

It is in this type of case that the vendor is most likely to obtain relief. If the conveyance has not yet been executed, he may ask the court to refuse a decree of specific performance on the same grounds as those discussed above. He may also ask for rescission of the contract, or, if the conveyance has been executed, of the conveyance. This remedy has been granted in a line of cases which must now be examined.

In *M'Carthy* v. *Decaix* (*d*), relief was given to a husband, a Dane domiciled in Denmark, who had renounced his interest under his marriage settlement. He had divorced his wife in Denmark and acted on the assumption that such divorce would be recognised in England (*e*). He acted also under a mistake as to the financial position of his wife. The case involved mistake of fact and also mistake of law; but the language of the Lord Chancellor makes it clear that he was willing to give relief in respect of either type of mistake (*f*).

Two early cases in which conveyances of land were cancelled were *Lansdown* v. *Lansdown* (*g*) and *Bingham* v. *Bingham* (*h*). In the former there was a dispute between brothers as to their rights of inheritance. They referred the question to one Hughes, a local schoolmaster, who consulted the Clerk's Remembrancer, but gave them wrong advice. As a result, the brothers came to an agreement concerning the division of the lands, and conveyances followed. The conveyances were cancelled on the ground

(*b*) *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597.

(*c*) *Torrance* v. *Bolton* (1872) L.R. 8 Ch.App. 118; *Solle* v. *Butcher* [1950] 1 K.B. 671, 693.

(*d*) (1831) 2 Russ. & My. 614.

(*e*) As it would have been at the present day. The rule that no foreign court has jurisdiction to dissolve an English marriage was laid down in *Lolley's Case* (Russ. & Ry. 237; 2 Cl. & F. 567 (n)) in 1812, at a time when the English courts had no jurisdiction to grant divorce. This decision came after the occurrence of the facts on which *M'Carthy* v. *Decaix* was based (1807-8), but before the decision was given.

(*f*) (1831) 2 Russ. & My., at p. 623, where Lord Brougham L.C. said: "Upon these two grounds I am clearly of opinion that the agreement cannot be supported as a valid renunciation."

(*g*) (1730) Mos. 364; 2 Jac. & W. 205.

(*h*) (1748) 1 Ves.Sen. 126.

of mistake and misrepresentation of law (*i*). *Bingham* v. *Bingham* was a case in which a conveyance was made of the land belonging to the purchaser. He brought a bill for the cancellation of the conveyance and refund of the purchase-money, and obtained a decree (*k*).

These cases concerned mistakes as to the legal title to land. *Cooper* v. *Phibbs* (*l*) was in this way similar. In that case a covenant was executed in 1827 that certain property, which included a fishery, should be settled upon two brothers successively in tail male. The elder died leaving daughters only. The younger died and his eldest son, the plaintiff, wished to obtain possession of the fishery, and believed, as a result of the settlement of 1827 and of a private Act of Parliament in 1837 (*m*), that the fishery was now owned by the elder brother's daughters. He entered into an agreement for a lease of the fishery from them "together with the Rapids Cottage, coach house and gatehouse at a yearly rent of £550." The daughters (represented by Phibbs, their trustee), and their father had spent considerable sums of money on the improvement of the fishery under the provisions of the private Act of Parliament. The plaintiff prayed for the cancellation and delivery up of the agreement on the grounds of mistake. The answer from the respondents was that it was a mistake of law and therefore ineffective. The fishery was owned by the plaintiff (appellant), but the cottage, coach house and gatehouse by the respondents. The House of Lords set aside the agreement on such terms as were just between the parties (*n*). The case was referred back to the Irish court because all the interested parties were not before the House; it was remitted with a declaration to the effect that the agreement was set aside, subject to the plaintiff paying a proper accommodation rent for such part of the property the subject of the agreement as the respondents did own; and to the creation in the respondents' favour of a lien on the fishery to secure the payment of money expended in making improvements to the fishery. It is arguable however that this case is not a decision on mistake of law for the mistake was as to private rights, and private rights are a question of fact and

(*i*) The misrepresentation of law was made by Hughes. It is difficult to see how the misrepresentation of a person who is not a party to the conveyance can affect the matter. As between parties to the conveyance, the question, it is submitted, must be treated as one of mistake.

(*k*) There was a misrepresentation of law by the defendant in this case: see Ves.Sen.Supp. 79. But the decision appears to have been given on the ground of mistake.

(*l*) (1867) L.R. 2 H.L. 149.

(*m*) 1 Vict. c. lxxxix.

(*n*) (1867) L.R. 2 H.L. 172–4.

not of law (*o*). But it has been pointed out that this argument is not convincing (*p*). The case is different from the present hypothetical case in that the mistake was as to the legal effect of a family document and a private Act, while the present one is concerned with the general law. The vendor must maintain therefore that the jurisdiction is available in cases of mistake of law as to rights of ownership, whether derived from private Acts, family documents or from public general Acts. Such a proposition is in accordance with the earlier cases and formed the basis of a most valuable judgment by Denning L.J. in *Solle* v. *Butcher* (*q*).

The dicta in *Earl Beauchamp* v. *Winn* (*r*) throw further light on the general problem. The question at issue was whether a contract for the sale or exchange of land should be set aside on the grounds of mistake. The contract was made on the assumption that the Earl was entitled to a warren of conies in certain land, and Mr. Winn to the land itself. They agreed to exchange properties and the Earl to pay a sum of money in addition. The rights of the parties were derived from earlier conveyances, and the Earl in this action claimed relief on the ground that he, and not Mr. Winn, was entitled to the land itself. The action failed because the House of Lords held that the Earl was only entitled to the warren of conies; but it appears from the dicta that they would have given relief if the Earl had contracted under a mistake as to his entitlement. Lord Chelmsford said (*s*): "I have come to the conclusion that supposing a foundation had been laid for the interposition of Equity by showing that the Earl had mistaken his right to the East Common, and that he was in law the owner of the soil, instead of having merely a right over the surface, there would have been nothing in the objections which have been urged on the part of the respondent to prevent his claim to have the agreement set aside being entertained." He also distinguished between mistake as to the legal effect of private arrangements and mistake of the general law (*t*).

The most recent of the leading cases on this subject is *Solle* v. *Butcher* (*u*). In that case, the question concerned the lease of a flat by the defendant to the plaintiff for a term of seven years at a rent

(*o*) At p. 170. The case could also have been decided on the ground of innocent misrepresentation of law: *per* Lord Cranworth, at p. 164.
(*p*) *Supra*, p. 378
(*q*) [1950] 1 K.B. 671, 689.
(*r*) (1873) L.R. 6 H.L. 223.
(*s*) At p. 235.
(*t*) At p. 234.
(*u*) [1950] 1 K.B. 671. See also *Allcard* v. *Walker* [1896] 2 Ch. 369.

of £250. The flat was a structure rebuilt from the ruins of a previous building which had been destroyed by a landmine during the war. In the negotiations the question arose whether the rent of the flat was controlled by the Rent Acts and thereby limited to the rent of the damaged pre-war structure plus such increases as were permitted under the Acts—in this case £140. It would be so restricted unless the flat was a "new and separate dwelling-house" as determined by the decisions under the Rent Acts (*a*). Both parties were satisfied that it was not so controlled, the plaintiff having taken legal advice; and the lease was executed. Some time later the plaintiff brought an action to establish that the permitted rent was £140, and for the recovery of the amount of rent overpaid in accordance with the agreement. The Court of Appeal held that the flat was controlled by the Rent Acts, but, by a majority, reversing the county court, set aside the lease on such terms as were fair and just to both parties (*b*).

In the Court of Appeal, Bucknill L.J. was in favour of granting relief on the ground that the mistake was one of fact because it was a mistake as to private rights (*c*). Jenkins L.J., dissenting, held that no relief should be given as the mistake was one of law (*d*). The judgment of Denning L.J. is the most constructive and the most important for the present purpose. He referred to the distinction between contracts that are void at common law, and those which equity will exercise its jurisdiction to set aside on such terms as are just in the circumstances. This will be done whenever the court is of the opinion that "it was unconscientious for the other party to avail himself of the legal advantage which he had obtained" (*e*). This may be due to misrepresentation, to knowledge by one party of the other's mistake as to the terms of the offer or the identity of the party; or where the parties are "under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault" (*f*).

(*a*) Megarry, *The Rent Acts* (8th ed.), 103–7.
(*b*) [1950] 1 K.B. 697. The terms were that the defendant should give an undertaking to permit the plaintiff to be a licensee until the grant of a new lease. The defendant would then, since he would be in legal possession of the premises, be able to serve notices under which it would be lawful to increase the rent (Rent and Mortgage Interest (Restriction) Act, 1938, s. 7). The defendant must undertake to grant the plaintiff a new lease at the new permitted rent, not to exceed £250 p.a., subject to the same covenants as in the previous lease. The plaintiff has the choice of accepting this lease or of going out of possession.
(*c*) At p. 685.
(*d*) At p. 703. The mistake in this case was one as to the general law.
(*e*) At p. 692.
(*f*) At p. 693.

The vendor must therefore try to bring himself within this doctrine. It has been assumed that there has been no misrepresentation by the other party. The vendor must show that the misapprehension was fundamental; this is a question of degree and will depend largely upon the difference between the "existing use" value of the land and the full value (*g*). It is a matter dependent on the circumstances of each case. Whether the vendor was "at fault" or not is another question which is governed by the circumstances of each case. It is clear that contracting parties are under a duty to take proper steps to find out what the law is (*h*). It is in this respect that ignorance or mistake in the general law is more culpable than ignorance of private Acts or family arrangements; the law on the point in question was easily ascertainable to anyone who took advice, and, though the question will depend on the circumstances, the vendor in this situation may well have some difficulty in showing that he was not at fault.

If, however, the circumstances of the case permit the vendor to overcome these two hurdles, there are further difficulties which will face him. In the first place, the jurisdiction upon which Denning L.J. relied in *Solle* v. *Butcher* is not firmly established (*i*). It is submitted that it is one that should be encouraged as it is one which will enable the court to do justice where no other remedy is available (*k*), but its application in practice is not entirely predictable. The decision in that case was a majority decision, and Bucknill L.J., who agreed with Denning L.J.'s conclusion, reached it by another route. The usual formulation of the rule of equity giving relief in this type of case contains a reference to "private rights" and this doctrine, as has been seen, may be limited to cases of ignorance or mistake of rights dependent on rules of law other than general law. Secondly, the authorities dealing with rescission for mistake of law have been cases in which the mistake was in the misunderstanding or misapplication of rules of law whose existence was known. This case is one of ignorance of the existence of the law. Whether this puts the vendor in a better or worse position in point of theoretical argument has been discussed; it certainly brings him further away from the decided

(*g*) *Eaglesfield* v. *Marquess of Londonderry* (1876) 4 Ch.D. 693; *Earl Beauchamp* v. *Winn* (1873) L.R. 6 H.L. 223, 232.

(*h*) *Earl Beauchamp* v. *Winn*, *supra*, at p. 233.

(*i*) 70 L.Q.R. 385, 403; *Harrison & Jones, Ltd.* v. *Bunten & Lancaster, Ltd.* [1953] 1 K.B. 646.

(*k*) Jenkins L.J., the dissenting member of the court, concluded his judgment by saying: "My brethren take a different view, and I may perhaps be allowed to add that my regret in differing from them is tempered by satisfaction that they have found it possible to arrive at a solution which accords with what I myself feel to be the merits of the case": [1950] 1 K.B. 671, 707.

authorities. Thirdly, if the sale took place before January 1, 1955, it is questionable whether the rule of law, in ignorance of which the vendor acted, was in existence at the time of the sale. The White Paper could do no more than state the Government's intentions. The statute could of course enact that all transactions entered into between November 18, 1952, and January 1, 1955, shall be treated as if the law, later enacted, was in force as from November 18. But it did not do that. It came into effect on January 1, 1955, and made certain retrospective provisions. To be ignorant of the Government's stated intention is different from being mistaken as to the law. A failure to forecast what the law is going to be is also different; and, while it can be argued that retrospective provisions may theoretically be held to have been in operation before they were enacted, the factors relevant to considering whether relief should be given in such a case are different from those relevant to mistakes of law already enacted. Again the vendor's claim to relief may be supported by theoretical argument, but the authorities giving relief do not cover such a case. Lastly, an application for relief in this case would ask the court to take the right to relief further than it has previously been taken. Previous cases have been concerned with mistakes as to the entitlement of the plaintiff to the interest conveyed; this case concerns a mistake as to the inclusion, in a conveyance of land, as to which there was no mistake, of a portion of the full value of the land which had at one time been separated by statute from the title to the land. Had there been two sales, one of the land and one of the development value, the sale of the development value, belonging as it did to the purchaser, would more nearly come within the ambit of the rules granting relief. Where there is a single sale, the court must be asked to rescind it because of a mistake as to the ownership of an inseparable part of what has been transferred. This may again be a question of degree dependent on relative values, but it is a further difficulty of which the vendor should be aware. In *Cooper* v. *Phibbs* (*l*), the conveyance was set aside because one of the properties dealt with was owned by the plaintiff. The properties there however were physically separate, and not, as in this case, both naturally and, from the coming into operation of the 1954 Act, statutorily, part of a single whole.

It is thought therefore that, while a case can be made out for the vendor in the circumstances laid down, his application for rescission would be unlikely to succeed. Whether or not he can

(*l*) (1867) L.R. 2 H.L. 149.

show that the mistake is fundamental depends on the circumstances. In normal circumstances it is submitted that he will not be able to show that his ignorance of the law was not due to his fault. In any case he must then rely on a doctrine which is only precariously established with regard to mistake or ignorance of the general law, and an entirely new application of which is necessary to give relief in this particular case.

NOTES OF RECENT CASES

1. *REAL PROPERTY*

By F. R. Crane, ll.b., Solicitor

Cobb v. *Cobb* [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696 (C.A.)

Husband and wife—joint purchase and mortgage of matrimonial home—mortgage instalments paid by husband—jurisdiction of court—Married Women's Property Act, 1882, *s.* 17.—The facts found were that on their marriage in 1936 the husband and wife each contributed £230 towards the purchase of a house, which was conveyed to them as joint tenants; that they mortgaged it as joint tenants for £1,300; that it was arranged that the husband would make the repayments (which when the marriage broke down in 1954 amounted to some £650); and that the wife would make other contributions to the home (estimated at £70). The county court judge on an application by the husband under the Married Women's Property Act, 1882, s. 17, ordered a sale, and payment of only £300 to the wife.

The Court of Appeal (Denning, Birkett and Romer L.JJ.) held (1) that section 17 gives the court no jurisdiction to vary property rights but only to determine them if uncertain (distinguishing *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63, where in the absence of evidence equality was equity). Here the evidence showed the parties were entitled on purchase in equal shares and therefore they so remained; the mere fact that this might later on seem unfair was irrelevant; (2) it would be inappropriate to order a sale against the opposition of the wife, one of two legal joint tenants who was in residence, and as matrimonial proceedings were pending; and (3) that as from the breakdown of the marriage the mortgage repayments should be borne equally, as being the only fair thing to do. To reach this conclusion consistently with their first finding the court must, it seems, have regarded the arrangement about repayment as limited to the continuance of a happy marriage.

This case, like *Re Roger's Question* [1948] 1 All E.R. 328, and *Rimmer* v. *Rimmer, supra,* emphasises the importance of a clear and recorded understanding about property rights where husband and wife join in a purchase, though their natural reluctance to contemplate either death or differences of opinion may make this difficult to obtain.

2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Westminster Bank, Ltd. v. *Lee* [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883

Husband and wife—matrimonial home—equitable mortgage—priority.

[See article on p. 343.]

Re Wynn (deceased), Public Trustee v. *Newborough* [1955] 1 W.L.R. 940; [1955] 2 All E.R. 865 (Ch.D.)

Trust for sale—powers of trustees—improvements—payment from capital or income—Settled Land Act, 1925, ss. 73, 83; Agricultural Holdings Act, 1948, ss. 81, 96.—The Settled Land Act, 1925, ss. 73, 83, and the Third Schedule, created three categories of improvements which might be done at the expense of capital—those which could fall wholly on capital, those where the trustees could require the tenant for life to repay the cost out of income, and those where the cost had to be repaid out of income. Other expenses, including running repairs, could not be financed from capital at all. As is well known, the Agricultural Holdings Act, 1948, ss. 81, 94, 96, and the Third Schedule, in effect amended the Settled Land Act by adding "repairs to fixed equipment" (*i.e.*, most ordinary running repairs) to those improvements which could be wholly borne by capital (*Re Duke of Northumberland* [1951] Ch. 202). Where the expenditure occurred before 1948, or where at the time of expenditure the tenant for life did not contemplate payment by capital, it appears that recoupment may not be obtainable; moreover, the tenant for life must in any event remember that he is trustee for all parties (*Re Sutherland Settlement Trusts* [1953] Ch. 792; *cf. Re Lord Brougham and Vaux* [1953] 2 All E.R. 655).

In the instant case Harman J. had to consider the application of the above rules to trusts for sale. He held (1) that the Law of Property Act, 1925, s. 28, incorporated all the above powers, in extension of any powers given by the settlement; (2) that the Agricultural Holdings Act, 1948, s. 81 (1), providing that where capital money had been paid on improvements—as newly defined—no recoupment from income should be required, applied only where capital had actually been spent. Consequently, expenditure out of income by the trustee (the Public Trustee), even in ignorance of the Act of 1948, could not now be cast on capital. (3) Expenditure so far unallocated as between capital and income could be allocated by the Public Trustee in his discretion, or he could ask the court for guidance.

Under a Settled Land Act settlement, therefore, the tenant for life can require "repairs to fixed equipment" to be paid for out of capital; under a trust for sale the trustees can exercise the discretion vested in them by the instrument or statutes and are not compelled to

pay from capital. The decision emphasises that matters of management as well as of conveyancing must be considered when a choice is being made between a Settled Land Act settlement and a trust for sale. Each type has definite advantages from someone's point of view.

Leong v. *Chye* [1955] 3 W.L.R. 303; [1955] 2 All E.R. 903 (P.C.)

Condition subsequent—partial restraint of marriage—gift of personalty by will—in terrorem *doctrine*.—A Chinese testator, resident in Malaya, bequeathed shares of his residuary estate (in the events which happened) to the lawful widow of any son who predeceased him " provided such widow shall remain the widow of such deceased son . . . and lead a chaste life." The widow of one such predeceased son remarried.

The Judicial Committee of the Privy Council held that English law applied (following *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381), and that the proviso was a condition subsequent imposing a partial and so, possibly, valid restraint on marriage. Nevertheless, in the absence of a specific gift over, it was invalid as being *in terrorem*. The relevant rule of construction was stated in the following terms by Lord Radcliffe ([1955] 3 W.L.R. at p. 307; [1955] 2 All E.R. at p. 906): " For, whereas a condition subsequent in partial restraint of marriage was effective to determine the estate in the case of a devise of realty even without any new limitation to take effect on the forfeiture, so that a residuary devisee or heir came in of his own right, it was early determined, and consistently maintained, that a condition subsequent in partial restraint of marriage, when annexed to a bequest of personalty, was ineffective to destroy the gift unless the will in question contained an explicit gift over of the legacy to another legatee. And for this purpose a mere residuary bequest was not treated as a gift over. One thing at least is certain about this rule: it exists." (See Jarman on *Wills*, 8th ed., Vol. 2, pp. 1455–6, 1517–20). Lord Radcliffe's last sentence introduced an interesting though inconclusive survey of the origin and basis of the rule, occasioned by the Court of Appeal in Malaya's view that the rule need not be applied because, in effect, the testator's race and religion made it probable that he meant what he said. This view was rejected by the Judicial Committee, both as relying on inadmissible speculation about intention, and as amounting to the proposition that the English rule of construction should not be applied.

It may be added that counsel was not permitted to argue that the condition was void for perpetuity because the point was not taken in the court below.

Re Crossley's Settlement Trusts [1955] 3 W.L.R. 291; [1955] 2 All E.R. 801 (Ch.D.)

Settlement—personalty—contingent gift of entailed interest—intermediate income—Law of Property Act, 1925, *ss.* 130 (1), 175 (1). —By a settlement of personalty made *inter vivos* by Sir Kenneth Crossley and his brother, Eric Crossley, the relevant trusts were, after trusts for the named first son of Sir Kenneth Crossley which failed by reason of the beneficiary's death, " . . . (iii) upon trust for the second, third and other sons of Sir Kenneth Crossley successively according to seniority in tail male with remainder, (iv) upon trust for the said Christopher John Crossley for life." At the time of the summons Sir Kenneth was 78 years of age and had no further child but had remarried; Christopher Crossley was of full age. The question was whether the contingent gift to the unborn sons carried the income of the trust fund, which would then have to be accumulated or go on resulting trusts, or whether the income was payable to Christopher Crossley.

Wynn-Parry J. pointed out that prior to 1926 an executory limitation or devise of realty did not carry intermediate income, because of the rule that at common law a freehold estate could never be in abeyance (citing *Bective* v. *Hodgson* (1864) 10 H.L.C. 656, and *Re Mowlem* (1874) L.R. 18 Eq. 9). Consequently, the income would go to the heir-at-law or other person entitled if the executory gift did not become effective—in the instant case Christopher Crossley. However, here the trust fund was personalty. Section 130 (1) of the Law of Property Act, 1925, making entails of personalty possible for the first time, enacts that such entails shall have " the like results " as in the case of realty. The learned judge held these words covered the problem of intermediate income, so the rule as to realty applied. It was argued that this was inconsistent with section 175 (1) of the Law of Property Act, which enacts that contingent devises and bequests of real or personal property shall carry income (and so would, prima facie, direct the income to the unborn sons). Wynn-Parry J. held, however, that on this point the rules for dispositions *inter vivos* and wills must differ—" Under section 130 it seems to me that the old common law rule is preserved and is made applicable to personal property, though a different rule applies where the property is the subject of a testamentary disposition, when section 175 will apply " ([1955] 3 W.L.R. at p. 295; [1955] 2 All E.R. at pp. 804–5). This anomaly is regrettable, but any other conclusion would appear to strain the principles of statutory interpretation.

In the settlement the gift to Christopher Crossley was expressed to carry intermediate income for the purposes of the Trustee Act, 1925, s. 31, and Wynn-Parry J. also held that on the ground of construction the same conclusion should be reached.

Gordon v. *Gonda* [1955] 1 W.L.R. 885; [1955] 2 All E.R. 762 (C.A.)

Trustee—breach of trust—interest—partner as trustee—effect of order of court.—In this case the Court of Appeal (Evershed M.R., Hodson and Romer L.JJ.) decided three points. First, that an order of the court, which is not appealed, is, if clear and unambiguous, final, and cannot be reopened by reference to the pleadings or history of the case. Secondly, that an order that the plaintiff was beneficially entitled to one moiety of shares allotted to the defendant amounted to a declaration that the defendant was trustee for the plaintiff. Thirdly, that a trustee who has converted the trust property to his own use must pay interest, and that the appropriate rate is still 5 per cent.—at least here, where the point had not been taken in the court of first instance.

The background to this case was a partnership between the plaintiff, who at all times resided in Hungary, and the defendant concerning the exploitation of inventions in plastics. This partnership was dissolved when the Trading with the Enemy Act, 1939, was applied to Hungary in 1941, and the first action concerned a sum of £6,667 which represented partnership assets in the defendant's hands at that date. This action began as a partnership action—where interest is not payable—but changed its character and ended with the order above referred to. In the instant case, however, the Court of Appeal took the view that a partner who disposes of partnership assets may not infrequently become a trustee of the replacement—see *per* Evershed M.R., especially at [1955] 1 W.L.R., p. 894; [1955] 2 All E.R., p. 766. The amount of the interest in dispute was £1,871.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Morgan [1955] 1 W.L.R. 738; [1955] 2 All E.R. 632

Public recreation charitable—cy-près application.—It was admitted in this case without argument that a trust for a recreation ground, in a specified locality, to which the general public was admitted, was a good charitable trust. It had been so held in several unreported cases. This legal assumption underlay a number of important national campaigns for funds. It had been preserved from the wreck by the House of Lords in *I. R. C.* v. *Baddeley* [1955] 2 W.L.R. 552. It is curious that the present case will not itself find a home in the *Law Reports*, since this point is so important, but, of course, a point which is not argued is not a strong precedent. There was a further problem in this case. The village in question was quite adequately supplied with outdoor recreation facilities. Harman J. ordered that a

scheme should be drawn up to apply the bequest of £3,000 *cy-près* to appropriate indoor facilities such as a gymnasium or village hall.

(Theobald 347.)

Re Levien [1955] 1 W.L.R. 964; [1955] 3 All E.R. 35

Fourth class of charity—culture as charity—wide sense of education.—It has always been stated in the textbooks that educational charities are limited to instruction in the technique or skill of some subject and do not extend to its exercise. Thus, a good charitable endowment may be made to encourage students to win prizes at Bar Examinations or read in chambers, but not to reward a particularly effective cross-examination by a skilled practitioner or a particularly deft piece of commercial drafting. The Court of Appeal, however, in *Royal Choral Society* v. *I. R. C.*, only reported in [1943] 2 All E.R. 101, went much further. A society had been formed for the advancement of choral singing. Lord Greene held that this was an exclusively charitable object. It went beyond the training of choristers and covered the actual exercise of the art. His Lordship considered this was an extension of the idea of educational charity. The public taste was being enhanced by the performance as well as its senses gratified. Where is the line to be drawn? All experience has some educational quality, and much experience is cultivating or ennobling. Another important point was the fact that the prizes would be awarded to particular singers or choral composers individually, so that private gain was involved. Danckwerts J. considered that this was incidental to the main public object. The testator was less concerned that Mr. A. or Miss B. should received a presentation than that, hoping to gain such a prize, many singers would improve their own standards, and the public would benefit accordingly. The prize, presumably, was the bait and not the fish. This test seems in accordance with the recent decisions on police athletic clubs and decisions of that kind, where the enjoyment was private and the public benefit incidental. Since the *Choral Society* case was binding on a judge of first instance the learned judge had little scope for criticism of the principle involved.

(Theobald 347.)

Re Rumball [1955] 1 W.L.R. 1037; [1955] 3 All E.R. 71, C.A.

Religious charity—effect of trustee's discretion on charitable quality.—It is unfortunate when a home-drawn will ends its days in the Court of Appeal. When a well-drawn and sonorously sounding document does so, for neglect of a notorious principle, it is sadder. But the courts share the blame for this mishap, since the fine distinctions made in the decisions leave contradictory decisions on construction side by side in the books. It would seem an obvious precaution for a draftsman of a charitable bequest to use some phrase like " for charitable purposes " or " for religious charity." Yet vague

wording is introduced into professionally drafted wills which soon has the parties in Chancery. In the instant case residue was left to the Bishop of the Windward Islands for the time being—so far this was a clear charity, the bequest being made to him as Bishop without interest in his personal identity (*Re Flinn* [1948] Ch. 241; *Re Spensley* [1954] Ch. 233, 244)—with a superadded clause " to be used by him as he thinks fit in his diocese." The Court of Appeal was finally able to uphold this gift. The test of the effect of such superaddition is whether it limits or extends what has gone before. If it means that he is limited to his own diocese in what he does as Bishop, it is a good religious charity. On the other hand, if it breaks out from his episcopal character and makes him the vehicle of some different objective, the gift may fail if that objective is not expressly charitable. The Court of Appeal was bound by the decision of the House of Lords in *Farley* v. *Westminster Bank* [1939] A.C. 430, where a gift to a vicar " for parish work " was held to go beyond the effect of a simple gift to a vicar as such, and to go beyond the range of the purely charitable. The words in that case " enlarged what would otherwise have been implicit from the nature of the office of the donee, so as to comprehend non-charitable as well as charitable purposes." Unfortunately, there is an unreported case of *Re Beddy* (see [1955] 1 W.L.R. p. 1038n.) the other way which is so close in its draftsmanship to this instant case that the Court of Appeal gave no hint as to what the distinction was, though they considered that there might be one (pp. 1045, 1048). It is to be hoped that the draftsman who is familiar with *Re Beddy* will now bear *Re Rumball* in mind, though the case is not expressly overruled.

(Theobald 349)

Re Royal Society's Charitable Trusts [1955] 3 W.L.R. 342; [1955] 3 All E.R. 14

Merger of charitable funds—jurisdiction to extend range of investment.—This case is interesting in the light of the Government White Paper which was produced to deal with the same problem. The Royal Society is the trustee of several different trust funds. Separate administration of each fund means a disproportionate expense of management. Vaisey J. held that the court had inherent jurisdiction, apart from statute, to approve a combination of trust funds in the case of charities. Each charity would retain its own share of the benefits. The learned judge for the same reason approved an extension of the range of investment of the funds, being satisfied of the prudence and skill of the society in handling its trust investments. It was pointed out that this case was not necessarily a precedent for others. Reference should be made to para. 17 of the recent White Paper (Cmd. 9538, July, 1955) for policy on range of investments. Para. 64 of the White Paper and Chapter 13 of the Report on Charitable Trusts (Cmd. 8710) deal with unified trust funds and their advantage over splinter trust administration.

(Theobald 358)

4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Manners [1955] 3 All E.R. 83

Closing of class—immediate gift by will—afterborn child excluded. —This case is an illustration of a well-established rule and hardly seems to have been worth contesting. A testator, instead of giving a life interest with remainders over, gave an immediate interest to his grandchildren after deduction of a sum to give another beneficiary an annuity. The effect of this difference of machinery was very serious. There were two grandchildren alive when the testator died, Roy and Delene. The will directed that distribution should be postponed until the youngest child attained the age of 21. Another grandchild, Max, was born before the majority of the first two had taken place. It was held that Max could not qualify as a member of the class, since only those in existence when the testator died could possibly qualify. The postponement of distribution did not affect the vesting of the gift *in interest* but only in possession. In any case the reference to the children attaining 21 was construed as referring to children otherwise qualified as members of the class and not as altering the membership of that class. In fact any child attaining 21 could claim transfer of his presumptive share without waiting for a younger member of the class to do so (*Re Couturier* [1907] 1 Ch. 470). If testators are being advised to use immediate gifts, subject to annuities or charges or to deductions of shares of capital, and to avoid successive interests, they should also be warned of the limiting effect this will have on their beneficiaries. Had the widow, for example, had a life interest prior to the gift to the grandchildren, and Max been born during her life, he would not have been cut out. The case is an illustration of the doctrine generally known as the rule in *Andrews* v. *Partington* (1791) 3 Bro.C.C. 401 which has gained more general publicity among property lawyers recently. It is based on avoiding the hardship to admitted members of a class of being unable to claim any particular amount until all possible members are known, even if the period of distribution has arrived. It is not concerned with problems of perpetuities. It may, of course, incidentally affect them, since rules of construction must first be applied before we apply rules of substantial validity. The same is true of an unattested will containing a remote limitation. Formal invalidity there prevents the perpetuity rule applying, since there is nothing for it to apply to. If a true construction limits a class, say, to those in existence when a testator dies, as in this case of *Re Manners,* perpetuity problems are obviously excluded as both Roy and Delene are lives in being. Such constructions are not based, however, on a design to escape from the effects of the perpetuity rule. A will may not be twisted simply to prevent its provisions being held void for perpetuity.

(Theobald 293)

Re Cory [1955] 1 W.L.R. 725; [1955] 2 All E.R. 630

Supplying omitted words in will.—This case shows that the recent ruling of the Court of Appeal in *Re Follett* [1955] 2 All E.R. 22; [1955] 1 W.L.R. 429, does not prevent the court supplying an omission in a will if quite satisfied what has been omitted. The draftsman had begun to copy a common form power of appointment and omitted the main operative words " as he should appoint " but went on to say " and in default of and subject to any such appointment . . ." which showed that a power was meant to be included. Harman J. held that the four words should be supplied, which meant a general power. There was no evidence that any special power was intended.

(Theobald 642)

5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Temple v. *National Mutual Life Assurance of Australasia, Ltd.* [1955] 3 W.L.R. 264; [1955] 2 All E.R. 758

Rent Restrictions Acts—flats jointly assessed let together on appropriate day—rateable value of each flat ascertained by apportionment—flats subsequently separately assessed—not first assessment. —Two flats in a London building were, when the flats were first let, let together to the same tenant. The combined flats were assessed for rates as one unit, the rateable value being £147. This assessment was in force on " the appropriate day," namely, April 6, 1939. During the war a separate assessment of the two flats was made, one being assessed at £95 and the other at £34. The tenant of the flat assessed at £95 made an application to have its standard rent ascertained, on the ground that it was assessed for the first time during the war at £95 and was, therefore, within the Rent Acts. The county court judge held that the flat was assessed on April 6, 1939, not separately, but as part of a composite whole, and that, as a result of section 7 (2) of the 1920 Act, the amount of the combined assessment of £147 must be apportioned. He apportioned the figure in respect of the flat in question at £108. It was not, therefore, within the Acts. The tenant appealed, claiming that section 7 (3) and not section 7 (2) applied, on the ground that the flat was " first assessed " after the appropriate day. The Court of Appeal upheld the county court judge. The flat was assessed on the appropriate day as part of a composite whole. This was sufficient to bring it within section 7 (2). The decision is analogous to that in *Capital and Provincial Property Trust* v. *Rice* [1952] A.C. 142, although the latter case was concerned with different provisions. In principle, however, a dwelling can be " let " or " assessed " although it is only let or assessed, as the case may be, as part of a larger unit. No reference appears to have been made in

argument to *Rider* v. *Rollitt* [1920] W.N. 227, in which Lush J. decided what was in substance the same point as in the present case.

(Megarry, 8th ed., p. 164)

Guinness Trust (London Fund), Founded 1890, Registered 1902 v. *Green* [1955] 1 W.L.R. 872; [1955] 2 All E.R. 871

Rent Restrictions Acts—exclusions—interest of landlord belonging to a housing trust—modern meaning of "members of the working classes."—In this case the Court of Appeal approved and applied the dictum of Denning J. (as he then was) in *Green and Sons* v. *Minister of Health (No. 2)* [1948] 1 K.B. 34, 38, that the modern meaning of "working classes" is people in the lower income group. They held that the Guinness Trust was a housing trust within the meaning of section 33 (9) of the Housing Repairs and Rents Act, 1954, with the result that tenants of the trust were not protected by the Rent Acts. The definition of a housing trust for the purpose of the 1954 Act incorporates section 188 of the Housing Act, 1936, which refers to "members of the working classes." In the present case the Guinness Trust provided houses mainly for people in the lower income group, some of whom would not, however, be members of the "working classes" in the old-fashioned sense of manual workers. It was held, however, that in the modern sense mentioned by Denning J. they satisfied the definition. They were people in the lower income range whose circumstances were such that they deserved support from a charitable institution in their housing needs.

Frish, Ltd. v. *Barclays Bank Ltd.* [1955] 3 W.L.R. 439; [1955] 3 All E.R. 185

Landlord and Tenant Act, 1954—application for a new lease—opposition by landlords—landlords' intention to occupy—occupation by an object of a discretionary trust of which landlords are trustees—limitation of s. 41 (2).—One of the grounds on which a landlord may oppose an application by the tenant for a new tenancy under Part II of the Landlord and Tenant Act, 1954, is that the landlord intends to occupy the premises for the purpose of a business to be carried on by him there. Section 41 (2) provides that where the landlord's interest is held on trust the reference to the landlord in the above ground is to be construed as including reference to the beneficiaries under the trust or any of them. In the present case the Court of Appeal held that some limitation must be read into this very wide language, the limitation being that the beneficiary in question must have such an interest under the trust as either to entitle him to be put in occupation, or, at all events, to justify the trustees in letting him into occupation. The court accordingly held that the provision did not cover a person who was the mere object of a discretionary trust with whom the trustees had made an arrangement (on terms financially

advantageous to the trust) for the grant of a tenancy. This limitation has clearly much in its favour on common sense grounds, but does it not depart a little from that doctrine of literal interpretation of statutes which the House of Lords has recently indorsed?

X.L Fisheries, Ltd. v. *Leeds Corporation* [1955] 3 W.L.R. 393; [1955] 2 All E.R. 875

Landlord and Tenant, Act, 1954—*request by tenant for new tenancy—reversion acquired by local authority after date of request—local authority's power to utilise section* 57 *procedure.*—Changes in the ownership of the reversion must inevitably take place sometimes after some procedural step has been taken under the complex machinery of Part II of the Landlord and Tenant Act, 1954, but before the procedure is completed. This case illustrates the kind of question which arises. The tenant of shop premises made a request in due form for a new tenancy under Part II of the Landlord and Tenant Act, 1954. The then landlord took no action on the tenant's request, but sold her interest to a local authority. The local authority thereupon, before the expiration of two months from the request, applied to the Home Office for a certificate under section 57 (1) that it was requisite for their purposes that the use or occupation of the premises should be changed as from the date when the current tenancy expired. The authority also notified the tenant at the same time that it had made the application. The Court of Appeal held that section 57 (4) applied, and the tenant's request for a new tenancy became of no effect pending the Home Secretary's decision. The Act did not require that the same person should be the landlord at the time when the tenant's request was made and at the time of the landlord's application and notification under section 57. The court left open the question whether, if the reversion changes hands after landlord A has given notice of opposition to the grant of a new tenancy based on some particular ground, *e.g.*, section 30 (1) (f), but before the expiration of two months from the tenant's request, the successor, landlord B, is bound by his predecessor's notice, or whether he can add to or modify it within the time limit, or whether he is left without effective means of opposition at all.

(Woodfall, 25th ed., Permanent Supplement (pp. 112–4)

Diploma Laundry, Ltd. v. *Surrey Timber Co., Ltd.* [1955] 3 W.L.R. 404; [1955] 2 All E.R. 922

Landlord and Tenant Act, 1954—*request for new tenancy under Part II—opposition by freeholder on ground that he intended to occupy the premises for his own business—surrender of intermediate interest within five years before the end of the tenancy and consequent merger—freeholder entitled to oppose.*—Section 30 (2) of the Landlord and Tenant Act, 1954, provides that a landlord shall not be

entitled to oppose an application for a new tenancy under Part II of the Act on the ground that he intends to occupy the premises for the purposes of his own business if his interest, " or an interest which has merged in that interest and but for the merger would be the interest of the landlord " was purchased or created within five years before the termination of the current tenancy. In the present case the freeholder's interest had been purchased well outside the five years' period but the question arose whether a merger which resulted from the surrender of an intermediate leasehold interest during the period operated as a disqualification. At first sight it would appear so to operate, but the Court of Appeal held that it did not, by reason of the definition of the expression " the landlord " in section 44. In applying this definition the court also held that the phrase " the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord " must be interpreted as relating either to the time when the tenant made his request or the time when the landlord gave notice of opposition. At either of these times the intermediate interest which had merged in the freehold would have had less than fourteen months to run, and would not thus have satisfied the requirements of section 44. It did not, accordingly, operate under section 30 (2) to disqualify the landlord from opposing the tenant's application. The court in this case has had to fill in a gap in the Act by an interpretation which, desirable as it is when one follows the reasoning, goes beyond the draftman's words. The complicated procedural machinery of the Act is not made easier by such *lacunae*.

(Woodfall, 25th ed., Permanent Supplement, p. 24)

Thomas Bookman, Ltd. v. *Nathan* [1955] 1 W.L.R. 815; [1955] 2 All E.R. 821, C.A.

Assignment—rent-controlled premises—reasonableness—refusal of consent—last seven and a half months of five-year term.—In this case the landlord had refused consent to the assignment of a tenancy of a dwelling-house within the Rent Restrictions Acts. The tenancy had originally been created for a five-year term and at the time of the disputed assignment there were seven and a half months to run. The county court judge found that the object of the assignment was not to enable the the assignee to claim a statutory tenancy, but the probable consequence was, of course, that such a claim would arise. The county court judge, therefore, held that the landlord's refusal to consent to the assignment was not unreasonable. His decision was reversed on appeal. The cases of *Swanson* v. *Forton* [1949] Ch. 143 and *Dollar* v. *Winston* [1950] Ch. 236 were distinguished on the ground that in these two cases the residue of the term was so short (twelve days in the first case and seven weeks in the second) that it was not a normal assignment but an entirely abnormal one. In the present case, having regard to the length of the remaining period and the object of the assignment, it could be said that the assignment

was perfectly normal. The court pointed out that the object of the assignment is not a decisive factor, but it is a material one.

(Woodfall, 25th ed., p. 629; Megarry, 8th ed., p. 179)

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6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.) or *Taxation Newspaper* (Taxation).)

Edwards (*Inspector of Taxes*) v. *Bairstow and Harrison*
[1955] 3 W.L.R. 410; [1955] 3 All E.R. 48 (H.L.)

Income Tax—Finding of fact—Review by court

Statutory provision: Income Tax Act, 1918, Schedule D, Case I (now Income Tax Act, 1952, s. 123).

Point: The House of Lords considered the power of the court to review findings of fact made by the General Commissioners. The court can set aside the finding of fact by the Commissioners if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. Extracts from the judgments are given below which the writer does not presume to précis, the length of which extracts is considered to be justified by the importance of the matter involved.

Facts and Decision: The respondents were assessed under Case I of Schedule D on the profits of what was alleged to be an adventure in the nature of trade. Not having previously dealt in machinery, they purchased a complete spinning plant with the object of making a quick resale. After various negotiations it was in fact sold in lots over a period of two years at a substantial profit. The Commissioners stated their decision as follows: "We find that the transaction, the subject-matter of this case, was not an adventure in the nature of trade."

Held: The appeal must be allowed and the assessments confirmed. There was no evidence in the exhaustive statement of facts which pointed to the transaction not being an adventure in the nature of trade.

Viscount Simonds L.C. in the course of his judgment (at 3 W.L.R. pp. 418 and 419) said: "When the Commissioners, having found the so-called primary facts which are stated in paragraph 3 of their case, proceed to their finding in the supplemental case that 'the transaction, the subject-matter of this case, was not an adventure in the nature of trade,' this is a finding which is in truth no more than an inference from the facts previously found. It could aptly be proceeded by the word 'therefore.' Is it, then, an inference of fact? My Lords, it

appears to me that the authority is overwhelming for saying that it is. Such cases as *Cooper* v. *Stubbs* ([1925] 2 K.B. 753), *Jones* v. *Leeming* ([1930] A.C. 415) and *C. I. R.* v. *Lysaght* ([1928] A.C. 234) (a case of residence) amongst many others are decisive. Yet it must be clear that to say that such an inference is one of fact postulates that the character of that which is inferred is a matter of fact. To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made. It is a question of law what is murder: a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction. The Commissioners making an inference of fact that a transaction is or is not an adventure in the nature of trade are assumed to be similarly directed, and their finding thus becomes an inference of fact. . . . It is true that the decision of the Commissioners is only impeachable if it is erroneous in law and it may appear paradoxical to say that it may be erroneous in law where no question of law appears on the face of the case stated. But it cannot be, and has not been, questioned, that an inference, though regarded as a mere inference of fact, yet can be challenged as a matter of law on the grounds that I have already mentioned [the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained], and this is I think the safest way to leave it."

Lord Radcliffe summarised the position as follows (at 3 W.L.R., pp. 422, 423):—"If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase

propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

Saunders v. *C. I. R.* [1955] T.R. 227

Income Tax—Power to determine settlement

Statutory provision: Finance Act, 1938, s. 38 (2) (now Income Tax Act, 1952, s. 404).

Point: This important case, of which only an abbreviated report is as yet available, illustrates the danger of using what are commonly termed "tax dodges." It had recently become common practice to seek to avoid the effects of Income Tax Act, 1952, s. 404 (and also s. 399) by providing that where a capital appointment was made under a settlement the trust fund should not be completely exhausted, it being arguable that the settlement was not thereby determined. However, it would appear that the determination of a "provision" of the settlement does not contemplate the cessation of some part of the written trusts but refers to the benefits provided by the settlement. Any settlement containing such a term may now prove to have been useless as a tax saving device, but it is unlikely that any difficulty will be found in making the appropriate alterations to confer some immunity from tax on the settlor for the future. Further comments will be made on the effect of this case when complete reports of the judgment are available.

Facts and Decision: Trustees had power to pay or apply any part of the capital of the trust fund subject to a settlement to or for the benefit of certain specified persons "freed and released from the trusts concerning the same." The trust fund was not to be reduced by virtue of the exercise of this power to less than £100.

Held: The settlement containing such power was within the terms of Finance Act, 1938, s. 38 (2) and that the income of the settled funds was in consequence to be deemed that of the settlor.

[The allied case of *C. I. R.* v. *Countess of Kenmare* (noted *ante*, p. 321) is understood to be in course of appeal to the Court of Appeal.]

Re Barbour's Policies of Assurance, Westminster Bank, Ltd. v. *C. I. R.* [1955] 3 W.L.R. 457; [1955] 3 All E.R. 41 (Ch.D.)

Estate Duty—Limited interest in policy of assurance

Statutory provision: Finance Act, 1894, s. 2 (1) (*d*).

Point: Where the fund subject to the trusts of a settlement consists of a policy of assurance the beneficiary entitled to the present income

(if any) during his life has a "life interest in possession" despite the absence of income and the absence of any right to get income by surrendering the policy. The Crown conceded that there was no difference between the position where a person was absolutely entitled to the policy before and after the death of the assured (who was also the donor of the policy) and where a person held only the same limited interest before and after such death, a point left open in the decision of the House of Lords in *D'Avigdor-Goldsmid* v. *C. I. R.* [1953] A.C. 407. It therefore followed that no estate duty was payable under Finance Act, 1894, s. 2 (1) (d) in respect of the beneficiary's life interest on the death of the assured as no interest arose.

This decision goes a long way towards obviating the necessity for making absolute appointments under powers contained in settlements of assurance policies which have generally been considered necessary in order to take advantage of the *D'Avigdor-Goldsmid* decision. Although, technically, the decision rests upon the concession of the Revenue, Harman J. was impressed by the argument put forward by the taxpayer prior to such concession being made.

Note that this decision was applied in *Re Wrightson's Policies* (1955) Taxation 464.

Facts and Decision: By a settlement dated March 5, 1929, the settlor assigned to the trustee (*inter alia*) two policies on his life which were already fully paid up. The policies, which were "not to be treated as income bearing until the amounts payable in respect thereof shall have been received and invested," were not specifically made part of the trust fund but only the proceeds thereof after payment of duty. The income of the trust fund was directed to be accumulated until June 30, 1942, and then paid to the settlor's son. After the death of the settlor's son without issue (which happened on July 3, 1937) the income was payable to the settlor's nephew James during his life with divers remainders over. There was no power to surrender the policies during the life of the settlor. James survived the settlor who died on October 3, 1951, when Victory Bonds and cash of the value of approximately £20,000 were received by the trustee.

The Crown claimed estate duty under Finance Act, 1894, s. 2 (1) (d), and in correspondence with the trustee sought to distinguish the *D'Avigdor-Goldsmid* decision on the ground that the policy in this case was not the absolute property of James but was part of a settled fund in which he had a life interest. Harman J. (at 3 All E.R., p. 44) summed up this argument as follows: "duty became exigible because James having survived the settlor became for the first time indefeasibly entitled to a life interest in the policy moneys, his interest having during the life of the settlor been liable to be defeated by his death. This seems to be an argument based on the decision of the House of Lords in *Adamson* v. *Att.-Gen.* [1933] A.C. 257. . . ." The trustee contested this distinction before the court and Harman J. stated that he was impressed by the trustees' argument. However, the Crown conceded this point and relied on the narrower point of construction that as the policies did not fall in until the death of the settlor the interest of James only arose at that date.

Held: The interest of James was a life interest in possession before the death and no duty was payable on the death. *Att.-Gen.* v. *Dobree*

[1900] 1 Q.B. 442 cannot stand with *D'Avigdor-Goldsmid* v. *C. I. R.* [1953] A.C. 407. *Westminster Bank, Ltd.* v. *Att.-Gen.* [1939] Ch. 600 rested upon the admission by the trustees as did *C. I. R.* v. *Scott's Trustees*, 1918 S.C. 720. Counsel for the taxpayer reserved the right to argue in a higher court (if necessary) that policies of assurance which are dealt with expressly by Finance Act, 1894, s. 2 (1) (c) do not properly come within the mischief of section 2 (1) (d), a point not open in the court of first instance.

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7. *MISCELLANEOUS*

Martin-Baker Aircraft Co., Ltd. v. *Canadian Flight Equipment, Ltd.* [1955] 3 W.L.R. 212; [1955] 2 All E.R. 722

Commercial contract — no provision for determination — contract determinable on reasonable notice.—A "know-how" agreement was entered into between an English company and a Canadian company whereby the former granted a licence to the latter to manufacture the former's products for sale on the American continent. No provision was made for terminating the agreement by either side. The royalties payable were for the most part fixed sums and not dependent on the price at which the Canadian company sold the goods. The English company contended that the agreement was determinable on reasonable notice, the Canadian company contending that the agreement was permanent. The Canadian company relied upon *Llanelly Railway and Dock Co.* v. *L. N. W. Ry.* (1875) L.R. 7 H.L. 550 as establishing the proposition that prima facie every contract is permanent and irrevocable. There were exceptions to the rule, as in the case of contracts of partnership, master and servant, principal and agent, and contracts involving mutual trust and confidence. McNair J. did not accept that there was any presumption in favour of permanence established by this case and in any event held that it had no application to an agreement in a commercial or mercantile field. The common law in relation to commercial transactions always proceeded more on the basis of reasonableness rather than on the basis of rigidity. After examining the terms of the contract the learned judge held that it was determinable on reasonable notice. Two factors particularly influenced him in this decision, the first that there was no obligation upon the Canadian company to manufacture and the second that the royalties were of fixed amounts, no provision being made for variation. The fact that the Canadian company would be at considerable capital expense in equipping themselves to manufacture the products was not sufficient to outweigh these considerations. In the circumstances he held that twelve months' notice was reasonable. The instant case was distinguished from *Re Berker Sportcraft Ltd.'s Agreements* (1947) 177 L.T. 420, where it was held that a licence granted by a dress designer to a company was not determinable on reasonable notice because there was an express provision providing for determination in certain specified events.

Penney v. *Berry* [1955] 1 W.L.R. 1021; [1955] 3 All E.R. 132

Cellar flap in pavement—Public Health Acts Amendment Act, 1890, s. 35 (1)—obligation of frontager to keep in good condition and repair—projection after reconstruction of pavement by local authority. —It is provided by the Public Health Acts Amendment Act, 1890, s. 35 (1), that all cellar heads and coal holes in the surface of any street and all landings, flags or stones of the path or street supporting the same " shall be kept in good condition and repair by the owners or occupiers of the same, or of the houses or buildings to which the same respectively belong." The short point of this case was whether this section imposed an obligation on a frontager to prevent a cellar flap from projecting above the pavement where the reason for the projection was the reconstruction of the pavement by the local authority. It is hardly surprising that the court held that the obligation on the frontagers, which was imposed for the benefit of the local authority, did not extend to remedy a nuisance created by the local authority itself. The cellar flap was in good condition and it was merely the design or layout, for which the local authority was responsible, that caused the nuisance.

THE LIBRARY

Megarry on The Rent Acts. Eighth Edition. By Ashley Bramall, b.a., and P. V. Baker, b.c.l., m.a., Barristers-at-Law. London: Stevens & Sons, Ltd. 1955. lxxxiv and 818 pp. (£2 15s.)

It is unusual for the author of a legal textbook to be edited in his own lifetime, but Mr. R. E. Megarry has achieved this distinction. It will be even more unusual if, as he anticipates, he brings out the next edition himself. He has been well served by his editors, Mr. Bramall and Mr. Baker. If their new material lacks the characteristic sparkle of the master's *ipsissima verba,* this is no cause for complaint. The editors have done well to copy the master's solid virtues and avoid any mimicry of mannerisms.

The eighth edition is both longer and larger than the seventh. *Megarry* now definitely joins the ranks of the larger classics. This development is inevitable and regret that the book is no longer of a very convenient size to read in a train or bus is vain.

Apart from the stream of cases which never ends, two statutes affecting the subject-matter of the book have been passed since the last edition, the Housing Repairs and Rents Act, 1954, and the Landlord and Tenant Act, 1954. The Requisitioned Houses and Housing (Amendment) Act, 1955, also contains, in section 4, some relevant provisions. These have been referred to in footnotes and the Act, so far as required, has been printed in Appendix 3.

It is difficult to find anything to criticise in the new edition. All that has been said about the excellence of previous editions applies. The new material has been faithfully dealt with. As examples of the careful manner in which this has been done one might refer to the discussion on pages 388–389 of the limited extent to which Part II of the Landlord and Tenant Act, 1954 (and consequently the *Rose* v. *Hurst* [1949] 2 K.B. 372 principle) applies, despite section 43 (1) (*c*) of the Act, to mixed business and residential premises within the Rent Restrictions Acts, and the discussion on pages 371–373 of the calculation of the increase of rent on account of increased cost of services given by section 40 of the Housing Repairs and Rents Act, 1954. In dealing (pages 363–364) with the controversial issue of the "ceiling" and the notice to ignore internal decorative repairs the editors have presented the reader with a clear although brief statement of the rival views. One comment might be permitted. If a Regulation prescribes a form which is contrary to an Act, is the form a prescribed form at all within the meaning of the Act? Could it not be said that in these circumstances there is no *prescribed* form and that it is therefore open to a landlord to use a form of his own which is in accordance with the Act?

The Eighth Edition of *Megarry,* like its predecessors, can be unreservedly recommended to the profession. It is a *must* for the lawyer's bookshelf, and it should be on a bookshelf near the desk.

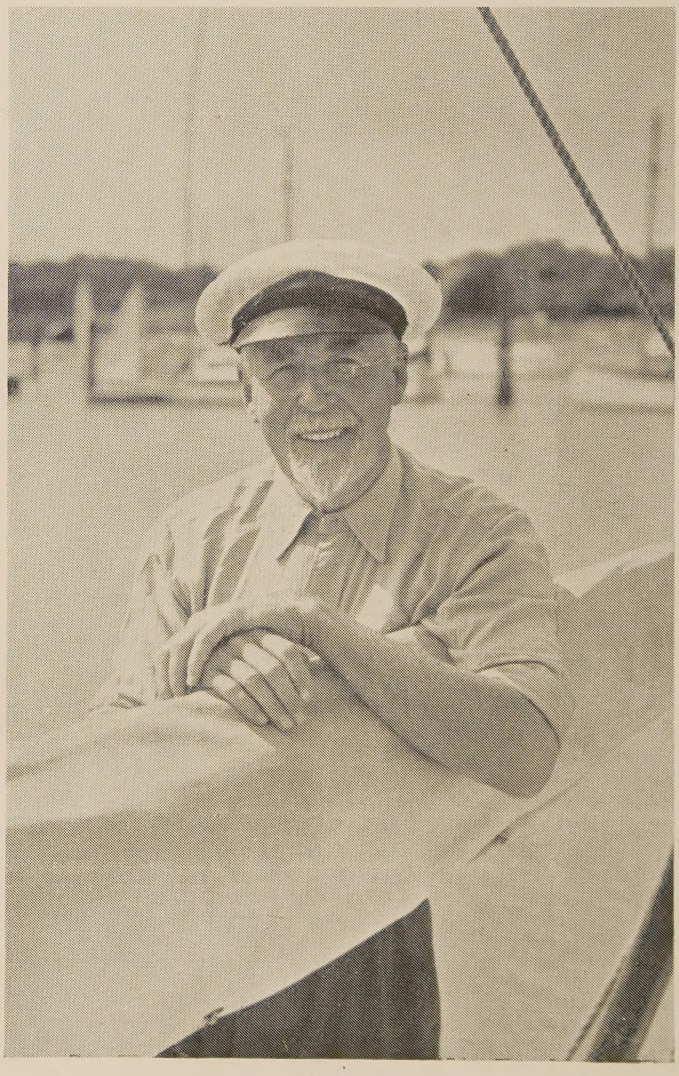
J. M. W.

Blundell's Rent Restrictions Cases. Third Edition and Supplement. By L. A. Blundell, ll.m., and V. G. Wellings, m.a.(Oxon.), Barristers-at-Law. London: Sweet & Maxwell, Ltd. 1955. (£2 10s.)

A hearty welcome will be given by practitioners to the third edition of *Blundell's Rent Restrictions Cases.* The new edition of this most useful case

book contains (with the first supplement which is published simultaneously) 1,215 cases. The previous edition and its cumulative supplement contained 906. The editors and publishers have done an invaluable service in bringing out a new edition. It goes without saying that editors of the experience and ability of Mr. Blundell and Mr. Wellings have done an expert job. The cases are summarised and annotated in a masterly manner, and the Digest of Cases is most carefully prepared. The supplement takes the story up to May 27. It is good to know that there will be more supplements from time to time. This work may be said to be one of those indispensable precision tools which law publishers today so efficiently provide. A copy must be in every office and chambers and, of course, in every county court bag.

J. M. W.



DONALD C. L. CREE

Editor, *The Conveyancer*, 1920–1936,
The Conveyancer and Property Lawyer, 1936–1955

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